EXHIBIT 8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York,

Defendant.

No.: 5:18-cv-1419 (MAD/TWD)

AFFIDAVIT OF MARK LIPPELMANN IN SUPPORT OF NEW HOPE FAMILY SERVICES' MOTION FOR SUMMARY JUDGMENT

I, MARK LIPPELMANN, hereby declare:

1. I am one of the attorneys for New Hope Family Services ("New Hope").

2. Attached as Exhibit A is a true and accurate copy of the Sept. 17, 2010, Governor's Memorandum, New York Bill Jacket, 2010 S. B. 1523, ch. 509.

3. Attached as Exhibit B is a true and accurate copy of OCFS Informational Letter, 11-OCFS-INF-01 (Jan. 11, 2011).

4. Attached as Exhibit C is a true and accurate copy of OCFS Informational Letter, 11-OCFS-INF-05 (July 11, 2011).

5. Attached as Exhibit D is a true and accurate copy of Proposed Rule Making Activities from the New York State Register, 35 N.Y. Reg.

6. Attached as Exhibit E is a true and accurate copy of Defendant's "Memorandum of Law for Appellee in Opposition to Motion for a Preliminary Injunction" dated August 23, 2019, and filed with the U.S. Court of Appeals for the Second Circuit in connection with New Hope's prior appeal in this case.

7. Attached as Exhibit F is a true and accurate copy of the Transcript of Proceedings held on February 19, 2019, before the Hon. Mae A. D'Agostino. This is a transcript of the oral argument before this Court concerning New Hope's motion for preliminary injunction and Defendant's motion to dismiss.

8. Attached as Exhibit G is a true and accurate copy of the Transcript of Proceedings held on November 13, 2019 before the Hon. José A. Cabranes, Reena Raggi, and Edward R. Korman. This is a transcript of the oral argument before the Second Circuit concerning New Hope's appeal from this Court's dismissal of its complaint and denial of its motion for preliminary injunction as moot.

I, Mark Lippelmann, a citizen of the United States and a resident of the State of Arizona, hereby declare under penalty of perjury under 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 8th day of October, 2021, at Scottsdale, Arizona.

Mark Lippelmann

EXHIBIT A

MAD
JG

CHAPTER 509

LAWS OF 20 10

SENATE BILL 1523-A

ASSEMBLY BILL _____

STATE OF NEW YORK

1523--A

Cal. No. 185

2009-2010 Regular Sessions

IN SENATE

February 2, 2009

Introduced by Sens. DUANE, BRESLIN, KRUEGER, SCHNEIDERMAN, SQUADRON -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

A. 5652-B Rosenthal

DATE RECEIVED BY GOVERNOR:

SEP 07 2010

ACTION MUST BE TAKEN BY:

SEP 18 2010

DATE GOVERNOR'S ACTION TAKEN:

SEP 17 2010

SENATE VOTE 40 Y 21 N HOME RULE MESSAGE ___ Y ___ N

DATE 6/24/10

ASSEMBLY VOTE 95 Y 44 N

DATE 7/1/10

S1523-A DUANE Same as A 5652-B Rosenthal (MS)

07/01/10	S1523-A	Assembly Vote	Yes: 95	No : 44
06/24/10	S1523-A	Senate Vote	Aye: 40	Nay: 21

Go to Top of Page

Floor Votes:

07/01/10 S1523-A Assembly Vote Yes: 95 No : 44

Yes Abbate	**Yes** Alessi	**Yes** Alfano	**No** Amedore
Yes Arroyo	**Yes** Aubry	**No** Bacalles	**No** Ball
No Barclay	**No** Barra	**Yes** Barron	**Yes** Benedetto
No Benjamin	**Yes** Bing	**Yes** Boyland	**Yes** Boyle
Yes Brennan	**Yes** Brodsky	**Yes** Brook-Krasny	**No** Burling
No Butler	**Yes** Cahill	**No** Calhoun	**No** Camara
Yes Canestrari	**ER** Carrozza	**No** Castelli	**Yes** Castro
No Christensen	**Yes** Clark	**No** Colton	**No** Conte
ER Cook	**No** Corwin	**No** Crespo	**ER** Crouch
No Cusick	**Yes** Cymbrowitz	**ER** DelMonte	**Yes** DenDekker
Yes Destito	**Yes** Dinowitz	**Yes** Duprey	**Yes** Englebright
No Errigo	**Yes** Espaillat	**Yes** Farrell	**Yes** Fields
No Finch	**No** Fitzpatrick	**Yes** Gabryszak	**Yes** Galef
Yes Gantt	**Yes** Gianaris	**No** Gibson	**No** Giglio
Yes Glick	**Yes** Gordon	**Yes** Gottfried	**ER** Gunther A
No Hawley	**No** Hayes	**Yes** Heastie	**Yes** Hevesi
ER Hikind	**No** Hooper	**Yes** Hoyt	**Yes** Hyer-Spencer
Yes Jacobs	**Yes** Jaffee	**ER** Jeffries	**Yes** John
No Jordan	**Yes** Kavanagh	**Yes** Kellner	**No** Kolb
Yes Koon	**Yes** Lancman	**Yes** Latimer	**Yes** Lavine
Yes Lentol	**Yes** Lifton	**No** Lopez P	**Yes** Lopez V
Yes Lupardo	**No** Magee	**Yes** Magnarelli	**Yes** Maisel
ER Markey	**Yes** Mayersohn	**No** McDonough	**Yes** McEneny
Yes McKevitt	**Yes** Meng	**No** Miller J	**Yes** Miller M
Yes Millman	**No** Molinaro	**No** Montesano	**Yes** Morelle
No Murray	**Yes** Nolan	**No** Oaks	**Yes** O'Donnell
No O'Mara	**Yes** Ortiz	**Yes** Parment	**Yes** Paulin
Yes Peoples-Stokes	**Yes** Perry	**Yes** Pheffer	**Yes** Powell
Yes Pretlow	**Yes** Quinn	**No** Rabbitt	**ER** Raia
Yes Ramos	**No** Reilich	**Yes** Reilly	**Yes** Rivera J
Yes Rivera N	**Yes** Rivera P	**No** Robinson	**Yes** Rosenthal
Yes Russell	**No** Saladino	**Yes** Sayward	**Yes** Scarborough
Yes Schimel	**No** Schimminger	**Yes** Schroeder	**Yes** Scozzafava
Yes Skartados	**Yes** Spano	**Yes** Stirpe	**Yes** Sweeney

No Tedisco	**Yes** Thiele	**Yes** Titone	**Yes** Titus
No Tobacco	**Yes** Towns	**No** Townsend	**Yes** Weinstein
Yes Weisenberg	**Yes** Weprin	**Yes** Wright	**ER** Zebrowski K
Yes Mr. Speaker			

Go to Top of Page

Floor Votes:

06/24/10 S1523-A Senate Vote Aye: 40 Nay: 21

Aye Adams	**Aye** Addabbo	**Aye** Alesi	**Nay** Aubertine
Nay Bonacic	**Aye** Breslin	**Nay** DeFrancisco	**Nay** Diaz
Aye Dilan	**Aye** Duane	**Aye** Espada	**Nay** Farley
Aye Flanagan	**Aye** Foley	**Aye** Fuschillo	**Nay** Golden
Nay Griffo	**Nay** Hannon	**Aye** Hassell-Thompson	**Aye** Huntley
Aye Johnson C	**Nay** Johnson O	**Aye** Klein	**Aye** Krueger
Aye Kruger	**Aye** Lanza	**Nay** Larkin	**Aye** LaValle
Nay Leibell	**Nay** Libous	**Aye** Little	**Aye** Marcellino
Nay Maziarz	**Nay** McDonald	**Aye** Montgomery	**Exc** Morahan
Nay Nozzolio	**Aye** Onorato	**Aye** Oppenheimer	**Aye** Padavan
Aye Parker	**Aye** Peralta	**Aye** Perkins	**Nay** Ranzenhofer
Aye Robach	**Nay** Saland	**Aye** Sampson	**Aye** Savino
Aye Schneiderman	**Aye** Serrano	**Nay** Seward	**Nay** Skelos
Aye Smith	**Aye** Squadron	**Aye** Stachowski	**Aye** Stavisky
Aye Stewart-Cousins	**Aye** Thompson	**Aye** Valesky	**Nay** Volker
Aye Winner	**Nay** Young		

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

APPROVAL # 25
CHAPTER # 509

SEP 17 2010

MEMORANDUM filed with Senate Bill Number 1523-A, entitled:

"AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child"

APPROVED

This bill would amend Domestic Relations Law § 110 to add to the delineated list of those who may adopt a child, an unmarried couple comprised of adult "intimate partners." In adding this language, the bill would make absolutely clear a principle that has already been established by the courts, *see In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (4th Dep't 2004) and that ensures fairness and equal treatment to families that are ready, willing and able to provide a child with a loving home. This includes same-sex couples, regardless of whether they are married. Moreover, since the statute is permissive, it would allow for such adoptions without compelling any agency to alter its present policies. It is a wise, just and compassionate measure that expands the rights of New Yorkers, without in any way treading on the views of any citizen or organization.

There are two aspects of this legislation that I believe warrant my comment, so as to make clear my understanding of this bill as I sign it into law. First, the term "intimate partners," although at the heart of the bill, is not defined in it. That should not, however, create any confusion. The term is defined elsewhere in New York law, *see* CPL § 530.11(e), and I believe such definitions contained in other titles provide adequate specificity as to the term's meaning, and would be looked to by agencies and courts in determining the appropriate construction of this law.

Second, I note that this amendment at least clarifies, and at most expands, existing law. It does not in any way limit or restrict it. Therefore, to the extent the law prior to this bill has been, or may be, read to permit any particular individual or individuals to adopt, including individuals who are neither married nor "intimate partners," there is nothing in this bill that would disturb such a reading.

In sum, this bill will enhance the rights of New Yorkers longing to be parents. As such, it is a welcome addition to New York law.

The bill is approved.

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1

BILL NUMBER: S1523A

SPONSOR: DUANE

TITLE OF BILL:
An act to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

PURPOSE OF BILL:
The purpose of this bill is to permit adoption by two adult unmarried intimate partners in keeping with the state's policy to ensure the best interests of the child.

SUMMARY:
The bill amends Section 110 of the domestic relations law to permit two adult unmarried intimate partners to adopt a child together. In addition, by replacing current references in the law to husband and wife with the gender neutral term "married couple", this proposal also clarifies that all married couples may adopt a child together.

JUSTIFICATION:
Current statutory provisions in New York State allow an adult unmarried person or an adult husband and his adult wife together to adopt a child. In addition, the statutory provisions permit an adult or minor husband and his adult or minor wife to adopt each other's child.

Courts have misinterpreted the word "together" in the statute to have a preclusive effect on the ability of unmarried couples to adopt a child together. In Matter of Jacob and Matter of Dana, the Court of Appeals ruled that the unmarried partner of a child's biological mother, whether heterosexual (Jacob) or homosexual (Dana), who is raising the child together with the child's biological parent, has standing to become the child's second parent by means of adoption. The decision of the court stated that the statute uses the word "together" simply to insure that one spouse does not adopt a child without the other spouse's knowledge or over the other's objection. The court determined that the statute does not preclude an unmarried second parent from adopting his or her partner's children and that this principal applies regardless of the couple's marital status or sexual orientation. See Matter of Jacob, 86 N.Y.S. 2d 651 (1995).

Despite these decisions, there is confusion about whether New York law permits a joint adoption by unmarried adult couples, neither of which is the biological parent. This can be particularly problematic for couples adopting children overseas where only one parent adopts in the foreign country and the second parent seeks to adopt in New York State. This legislation codifies the Court of Appeal's decision in Matter of Jacob and Matter of Dana, and will help ensure that unmarried adult couples may jointly adopt a child together where neither is the biological

parent of the child - a question that was not addressed by the Court of Appeals decision. See In Re Adoption of Carolyn B., 774 N.Y.S. 2d 227 (N.Y. App, Div. 2004).

Allowing unmarried adult couples together to adopt a child will also ensure the child receives the full benefits that the Court envisioned in Matter of Jacob and Matter of Dana including:

* Social security benefit in the event of a parent's death or disability;
* Life insurance benefits in the event of a parent's death; The right to sue for wrongful death of a parent;

* The rule to inherit under the rules of intestacy;

* Eligibility for health insurance coverage under both parents' health insurance policies;

* The right to have two parents participate in medical decisions in the event of an emergency;

* The right to receive economic support from two parents;

* The emotional security of knowing that in the event of death of parent, the other will have presumptive custody;

* The right to continue the relationships with both parent and extended families in the event of a separation; and

* The right to have both parents named on the birth certificate.

In addition, by replacing references to "husband and wife" with the gender-neutral term "married couple", this measure will help ensure that all married couples, regardless of their sexual orientation, have equal rights to adopt a child together.

LEGISLATIVE HISTORY:
Similar to 2009: A.5652 Referred to Judiciary
2007-2008: A.7449A Referred to Judiciary
2005-2006: A.8329 Referred to Judiciary

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:
None.

EFFECTIVE DATE:
Immediately.

STATE OF NEW YORK
DEPARTMENT OF STATE
ONE COMMERCE PLAZA
99 WASHINGTON AVENUE
ALBANY, NY 12231-0001

DAVID A. PATERSON
GOVERNOR

LORRAINE A. CORTÉS-VÁZQUEZ
SECRETARY OF STATE

MEMORANDUM

To: Honorable Peter J. Kiernan, Esq.
Counsel to the Governor

From: Matthew W. Tebo, Esq.
Legislative Counsel

Date: July 21, 2010

Subject: S.1523-A (Senator Duane)
Recommendation: No comment

The Department of State has no comment on the above referenced bill.

If you have any questions or comments regarding our position on the bill, or if we can otherwise assist you, please feel free to contact me at (518) 474-6740.

MWT/mel

New York State
Office of
Children &
Family
Services

David Paterson
Governor

Gladys Carrión, Esq.
Commissioner

Capital View Office Park

52 Washington Street
Rensselaer, NY
12144-2796

August 11, 2010

Honorable Peter J. Kiernan
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: S.1523-A
Support

Dear Mr. Kiernan:

This is in response to your request for comments on the above referenced legislation. The bill amends the Domestic Relation Law (DRL) provision that specifies who may adopt to clarify that two unmarried adult intimate partners may adopt a child together even where neither person is the child's biological parent. In addition, the bill substitutes "married couple" or "spouse" for references to "husband" and "wife" in describing who may adopt.

Currently, the DRL provides that an adult unmarried person or a husband and wife together may adopt. Various courts have interpreted this language as precluding two unmarried adults from adopting together. In *Matter of Jacob* and *Matter of Dana* 85 NY2d 651 (1995), the Court of Appeals construed the existing law as permitting the adoption of a child by the unmarried adult partner of the child's biological parent. The Court held that neither the statutory reference to a husband and wife adopting "together" nor the sexual orientation of the couple precluded such an adoption. However, *Matter of Jacob* and *Matter of Dana* did not address the ability of two single persons to adopt a child together where neither person is the biological parent of the child. This legislation clearly permits such adoptions.

The Office of Children and Family Services supports this bill as it is consistent with public policy to facilitate the placement of children, including foster children, in permanent caring homes when it is the best interest of such children.

Thank you for the opportunity to comment on this legislation.

Sincerely,

Karen Walker Bryce

Karen Walker Bryce, Esq.
Deputy Commissioner and General Counsel

CL #47

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

MARC C. BLOUSTEIN
LEGISLATIVE COUNSEL

July 19, 2010

Hon. Peter J. Kiernan
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Senate 1523-A

Dear Mr. Kiernan:

Thank you for requesting the comments of this Office on the above-referenced measure, which would amend the Domestic Relations Law to permit two adult unmarried intimate partners to adopt a child together. In addition, by replacing current references in the law to husband and wife with the gender neutral term "married couple," this measure also clarifies that all married couples may adopt a child together. This legislation is consistent with the Court of Appeals's decision in *Matter of Dana and Jacobs*, 86 NY2d 651 (1995), which permits adoptions by unmarried intimate partners.

This measure would have no impact on court administration. Accordingly, we have NO OBJECTION to approval.

Very truly yours,

Marc Bloustein

EMPIRE STATE PLAZA, 4 ESP, SUITE 2001, ALBANY, NY 12223-1450 • TEL: 518-474-7469 • FAX: 518-473-5514
MBLOUSTE@COURTS.STATE.NY.US

NEW YORK STATE CATHOLIC CONFERENCE

465 State Street • Albany, NY 12203-1004 • Phone (518) 434-6195 • Fax (518) 434-9796
www.nyscatholic.org e-mail:info@nyscatholic.org

RICHARD E. BARNES
Executive Director

July 29, 2010

Hon. David A. Paterson
Governor of New York State
Executive Chamber
State Capitol
Albany, NY 12224

Re: S.1523-A, Duane/A.5652-B, Rosenthal
Allows for unmarried adoption

Dear Governor Paterson,

The above-referenced bill would allow for adoption by two unmarried intimate partners.

The New York State Catholic Conference strongly **opposes** this legislation.

The Catholic Church teaches that we must treat our homosexual sisters and brothers with dignity and love, as we would all God's children, free of prejudice and hatred. However, evidence tells us that children's welfare is best served by their being reared in a stable home with a married mother and father. Two unmarried adults, whether same-sex or opposite-sex, lack the commitment and incentive to remain together, for the benefit of the adopted child.

Encouraging adoption and marriage between a married man and a woman, therefore, serves the state's interests. Well-reared children who are adopted by a married mother and father are much more likely to grow to be good citizens, thereby, creating wealth, stability and security for the members of the society.

Importantly, this legislation would seemingly mandate religious entities that operate adoption services to facilitate adoption for same-sex intimate partners or same-sex partners married in foreign jurisdictions, in violation of our religious beliefs and faith. Catholic Charities operates adoption services throughout the state. If this legislation was enacted, they might have to stop these invaluable services. Catholic Charities in both the Archdioceses of Boston and Washington, DC had to cease adoption services because of similar legislation and legal opinion.

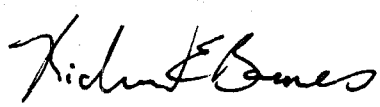
To address this issue, we propose the following amendment:

"No state or any other governmental agency shall deny, suspend or revoke a license, permission or certification to carry on any activity, including denial of renewal or recertification of such license, permission or certification, against any organization controlled by or in connection with a religious organization or denominational group or entity that refuses to provide any form of assistance or information about adoption on grounds that it would be contrary to the conscience or religious or moral beliefs of that organization or of the

religious organization or denominational group or entity by which it is operated, sponsored or controlled."

For these reasons, the New York State Catholic Conference strongly opposes this legislation and urges its veto.

Very truly yours,



Richard E. Barnes
Executive Director

 C509

the Center the Lesbian, Gay, Bisexual & Transgender Community Center

September 17, 2010

Honorable David Paterson
Governor of New York
Executive Chamber
Albany, NY 12224

Dear Governor Paterson:

I am writing on behalf of the Lesbian, Gay, Bisexual and Transgender Community Center, and the 6,000 people who visit us every week to request that you sign Bill A.5652-B. This landmark legislation (permitting unmarried partners, including same-sex couples, to adopt a child together) is important to the LGBT community, as it will permit two unmarried intimate adults – no matter their sexual orientation – to adopt a child and receive full legal guardianship. The right to family creation independent of the gender of the spouses is an important step towards full equality for LGBT New Yorkers, a cause for which you have demonstrated passion.

Under current law, if unmarried parents separate, the parent who is not legally attached to the child may be left with no rights to take part in the child's upbringing. In the event of a death, the child and the surviving partner may be left with no Social Security, life insurance or inheritance benefits. In either such case – separation or death – the event law's effects on the child could be devastating. This law seeks to remedy these harms and will prevent such disastrous situations from occurring.

We encourage you to continue your leadership on this issue and sign this important legislation to better protect LGBT families in New York.

Sincerely,

Glennda Testone
Executive Director

Cc: Assemblymember Linda Rosenthal and Senator Tom Duane

 S1523

Lawyers For Children, Inc.
110 Lafayette St., 8th Floor
New York, New York 10013
(212) 966-6420 • Fax (212) 966-0531
www.lawyersforchildren.org

Executive Director
Karen J. Freedman, Esq.

Deputy Executive Director
Glenn Metsch-Ampel, Esq.

August 3, 2010

The Hon. David Patterson
Executive Chamber
State Capitol
Albany, New York

Re: A05652B/S1523-A (Permitting Adoption By Two Unmarried Adult Intimate Partners)

Dear Governor Patterson:

We are writing to urge you to sign into law bill No. A05652B/S1523-A, which would permit two unmarried adult intimate partners to adopt children together.

Lawyers For Children ("LFC") is a not-for-profit corporation dedicated to protecting the rights of individual children in foster care and compelling system-wide child welfare reform in New York. For more than 25 years, LFC has provided award-winning legal and social work services to children in cases involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. Currently, we represent children and youth in more than 6,000 proceedings in New York City's Family Courts each year.

LFC STRONGLY SUPPORTS THIS BILL FOR THE FOLLOWING REASONS

Adoption provides children with safe, permanent homes and nurturing families. Nearly 1,000 children are freed for adoption each year in New York and more than 3,000 freed children are awaiting adoptive homes[1]. A number of those children are living in foster homes with two loving parents who are committed to each other and are committed to raising the child as their own, despite not being married. Because the current statute does not clearly provide that those parents are eligible to adopt, the children are deprived of the opportunity to have both of the people who are raising them be their legal parents. Many studies have shown that children benefit from having legal ties to two parents and receive countless other benefits as children of a two-parent household. We believe that when two qualified adults in a loving relationship want to make themselves available as parents to a child in need of a home, their marital status should not be a factor in their eligibility for consideration. Lawyers For Children enthusiastically supports permitting qualified unmarried partners to be eligible to adopt a child.

[1] Adoption Exchange Association, a cooperative program of the Children's Bureau, the Administration for Children and Families, the Dept. of Health & Human Services, found at http://www.adoptuskids.org/resourcecenter/rrtpackets/NewYork.aspx

We hope that we can count on you to continue to support laws to protect the needs of New York State's most vulnerable children. Please contact us if you have any questions about this bill and its benefits for children and families in New York.

Very truly yours,

Karen Freedman
Executive Director

Betsy Kramer
Public Policy and Special Litigation
Project Director

STATE OF NEW YORK

1523--A

Cal. No. 185

2009-2010 Regular Sessions

IN SENATE

February 2, 2009

Introduced by Sens. DUANE, BRESLIN, KRUEGER, SCHNEIDERMAN, SQUADRON -- read twice and ordered printed, and when printed to be committed to the Committee on Children and Families -- recommitted to the Committee on Children and Families in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The first undesignated paragraph of section 110 of the domestic relations law, as amended by chapter 254 of the laws of 1991, is amended to read as follows:

An adult unmarried person [~~or~~], an adult [~~husband and his adult wife~~] married couple together, or any two unmarried adult intimate partners together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor [~~husband and his adult or minor wife~~] married couple together may adopt a child of either of them born in or out of wedlock and an adult or minor [~~husband or an adult or minor wife~~] spouse may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

§ 2. This act shall take effect immediately.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD01449-08-0

EXHIBIT B

Andrew M. Cuomo
Governor

NEW YORK STATE
OFFICE OF CHILDREN & FAMILY SERVICES
52 WASHINGTON STREET
RENSSELAER, NY 12144

Gladys Carrión, Esq.
Commissioner

Informational Letter

Transmittal:	11-OCFS-INF-01
To:	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies
Issuing Division/Office:	Strategic Planning and Policy Development
Date:	January 11, 2011
Subject:	**Adoption by Two Unmarried Adult Intimate Partners**
Suggested Distribution:	Directors of Services Adoption Family Home Finders/Trainers Adoption Supervisors Foster Care Supervisors
Contact Person(s):	Any questions concerning this release should be directed to the appropriate Regional Office, Division of Child Welfare and Community Services: Buffalo Regional Office- Dana Whitcomb (716) 847-3145 Dana.Whitcomb@ocfs.state.ny.us Rochester Regional Office - Karen Buck (585) 238-8200 Karen Buck@ocfs.state.ny.us Syracuse Regional Office- Jack Klump (315) 423-1200 Jack.Klump@ocfs.state.ny.us Albany Regional Office- Kerri Barber (518) 486-7078 Kerri.Barber@ocfs.state.ny.us Spring Valley Regional Office- Patricia Sheehy (845) 708-2499 Patricia.Sheehy@ocfs.state.ny.us New York City Regional Office- Patricia Beresford (212) 383-1788 Patricia.Beresford@ocfs.state.ny.us Native American Services- Kim Thomas (716) 847-3123 Kim.Thomas@ocfs.state.ny.us New York State Adoption Services- Brenda Rivera (518) 474-9406 Brenda.Rivera@ocfs.state.ny.us
Attachments:	Governor's Approval Message –Chapter 509 of the Laws of 2010
Attachment Available Online:	N/A

Filing References

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
		18 NYCRR 421.1 (a)	§ 110(1) DRL		

I. Purpose

The purpose of this Informational Letter (INF) is to provide information to local departments of social services (LDSS) and voluntary authorized agencies regarding Chapter 509 of the Laws of 2010, which, consistent with current case law, amended section 110 of the Domestic Relations Law (DRL) in relation to expressly authorizing two unmarried adult intimate partners to adopt a child together. This law went into effect on September 17, 2010, and also substitutes the gender-neutral terms "married couple" and "spouse" in the adoption statute for "husband and wife," clarifying that all married couples may adopt a child together.

II. Background

Prior to the enactment of Chapter 509 of the Laws of 2010, section 110 of the DRL referenced that: "an adult unmarried person or an adult husband and his wife together may adopt another person." Over the years, this section of law has been the subject of several court decisions interpreting who may adopt.

In 1995, the New York State Court of Appeals ruled in *Matter of Jacob* and *Matter of Dana* 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995) that the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the child's biological parent, has standing to become the child's second parent through adoption. The Court held that neither the statutory reference to a husband and wife adopting "together" nor the sexual orientation of the couple precluded such adoption.

Following the Court of Appeals decision, other courts in New York State have held that two unmarried persons together could adopt a child even if neither were the biological parent of the child in question. The court in *In re Adoption of Carolyn B.* 6A.D.3d 67, 774 N.Y.S.2d 227 (2004) held that a joint adoption by two unmarried female partners who had established a family unit was in the best interests of the child, thereby promoting fairness and equal treatment to families that are ready, willing and able to provide a child with a loving permanent home. The court in *In re Adoption of Emilio R.* 293 A.D.2d 27, 742 N.Y.S.2d 22 (2002) issued a similar decision in regard to an unmarried heterosexual couple who sought to adopt the foster child for whom they had cared for for several years.

Chapter 509 of the Laws of 2010 codifies those court decisions that authorize unmarried persons to adopt a child together, even when neither is the biological parent of the child. The chapter does not, in any way, limit or restrict the rights of unmarried persons to adopt together, as such rights already exist under current law. It is intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home. Chapter 509 of the Laws of 2010 does not change or alter the standards currently in place for the approval of an individual as an adoptive parent or the eligibility requirements for adoption subsidies. A copy of the Governor's approval message of Chapter 509 of the Laws of 2010 is attached to this release.

The chapter amended the DRL to add that in addition to an unmarried person and a married couple, "any two unmarried adult intimate partners together" may adopt another person. For the purpose of an authorized agency determining whether an intimate relationship exists, the factors an agency should consider include, but are not limited to: the nature or type of the relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts should be considered to be an intimate relationship.

In addition, this amendment to the DRL replaces references to "husband and wife" with the gender-neutral term "married couple." This measure will help promote that all married couples, regardless of their sexual orientation, have equal rights to adopt a child together.

No changes in OCFS forms will be necessary as a result of Chapter 509 because, in 2006, OCFS adoption-related forms were amended to reflect gender neutrality.

III. Program Implications

This amendment to the DRL clarifies and supports the current case law that unmarried adult intimate partners may adopt a child together in New York State.

/s/ Nancy Martinez

Issued By:
Name: Nancy Martinez
Title: Director
Division/Office: Strategic Planning and Policy Development

APPROVAL MESSAGE:

APPROVAL MEMORANDUM - No. 25 Chapter 509
MEMORANDUM filed with Senate Bill Number 1523-A, entitled:

"AN ACT to amend the domestic relations law, in relation to authorizing two unmarried adult intimate partners to adopt a child"

APPROVED

This bill would amend Domestic Relations Law Section 110 to add to the delineated list of those who may adopt a child, an unmarried couple comprised of adult "intimate partners." In adding this language, the bill would make absolutely clear a principle that has already been established by the courts, see In re Adoption of Carolyn B., 774 N.Y.S.2d 227 (4th Dep't 2004) and that ensures fairness and equal treatment to families that are ready, willing and able to provide a child with a loving home. This includes same-sex couples, regardless of whether they are married. Moreover, since the statute is permissive, it would allow for such adoptions without compelling any agency to alter its present policies. It is a wise, just and compassionate measure that expands the rights of New Yorkers, without in any way treading on the views of any citizen or organization.

There are two aspects of this legislation that I believe warrant my comment, so as to make clear my understanding of this bill as I sign it into law. First, the term "intimate partners," although at the heart of the bill, is not defined in it. That should not, however, create any confusion. The term is defined elsewhere in New York law, see Section 530.11(e), and I believe such definitions contained in other titles provide adequate specificity as to the term's meaning, and would be looked to by agencies and courts in determining the appropriate construction of this law.

Second, I note that this amendment at least clarifies, and at most expands, existing law. It does not in any way limit or restrict it. Therefore, to the extent the law prior to this bill has been, or may be, read to permit any particular individual or individuals to adopt, including individuals who are neither married nor "intimate partners," there is nothing in this bill that would disturb such a reading.

In sum, this bill will enhance the rights of New Yorkers longing to be parents. As such, it is a welcome addition to New York law.

The bill is approved. (signed) DAVID A. PATERSON

EXHIBIT C

Andrew M. Cuomo
Governor

NEW YORK STATE
OFFICE OF CHILDREN & FAMILY SERVICES
52 WASHINGTON STREET
RENSSELAER, NY 12144

Gladys Carrión, Esq.
Commissioner

Informational Letter

Transmittal:	11-OCFS-INF-05
To:	Commissioners of Social Services Executive Directors of Voluntary Authorized Agencies
Issuing Division/Office:	Strategic Planning and Policy Development
Date:	July 11, 2011
Subject:	**Clarification of Adoption Study Criteria Related to Length of Marriage and Sexual Orientation**
Suggested Distribution:	Directors of Services Adoption Family Home Finders / Trainers Adoption Supervisors Foster Care Supervisors
Contact Person(s):	Any questions concerning this release should be directed to the appropriate Regional Office, Division of Child Welfare and Community Services: Buffalo Regional Office- Dana Whitcomb (716) 847-3145 Dana.Whitcomb@ocfs.state.ny.us Rochester Regional Office - Karen Buck (585) 238-8200 Karen Buck@ocfs.state.ny.us Syracuse Regional Office- Jack Klump (315) 423-1200 Jack.Klump@ocfs.state.ny.us Albany Regional Office- Kerri Barber (518) 486-7078 Kerri.Barber@ocfs.state.ny.us Spring Valley Regional Office- Patricia Sheehy (845) 708-2499 Patricia.Sheehy@ocfs.state.ny.us New York City Regional Office- Patricia Beresford (212) 383-1788 Patricia.Beresford@ocfs.state.ny.us Native American Services- Kim Thomas (716) 847-3123 Kim.Thomas@ocfs.state.ny.us New York State Adoption Service- Brenda Rivera (518) 474-9406 Brenda.Rivera@ocfs.state.ny.us
Attachments:	No
Attachment Available Online:	N/A

Filing References

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
11-OCFS-INF-01		18 NYCRR 421.16 (e) and (h)	§ 110(1) DRL	Adoption Services Guide	

I. Purpose

The purpose of this Informational Letter (INF) is to provide clarification to local departments of social services (LDSS) and voluntary authorized agencies regarding 18 NYCRR 421.16 (e) and (h) in relation to length of marriage and sexual orientation as adoption study criteria.

II. Background

Upon receiving an Application to Adopt (LDSS Form 857 or other application approved by the Office of Children and Family Services [OCFS]), the LDSS or voluntary authorized agency must conduct an adoption study [18 NYCRR 421.15]. As part of this adoption study process, LDSSs and agencies must explore the following characteristics of adoptive applicants:

- Capacity to give and receive affection;
- Ability to provide for a child's physical and emotional needs;
- Ability to accept intrinsic worth of a child, to respect and share his or her past, to understand the meaning of separation he or she has experienced, and to have realistic expectations and goals;
- Flexibility and ability to change;
- Ability to cope with problems, stress and frustrations;
- Feelings around parenting an adopted child and the ability to make a commitment to a child placed in the home; and
- Ability to use community resources to strengthen and enrich family functioning.
  [18 NYCRR 421.16 (a)]

At minimum, these are the characteristics needed to be approved to adopt a child. The written adoption study prepared by the LDSS or agency should include information regarding the assessment of these characteristics and on what basis they were determined to be present or absent.

In addition, there are other factors that an LDSS or voluntary authorized agency assesses within its adoption study process. These factors include the applicant's age, health, marital status, length of marriage (if applicable), fertility, family composition, gender preference with regard to child matching, employment and

education, religion and race, income, employment and geographical stability, child care experience, socialization and community support, child protective services history, alcohol or drug abuse, and criminal history background check.

Within these factors there are two areas that OCFS has recently determined need clarification. One section of regulation that needs to be clarified is 18 NYCRR 421.16 (e), which states: "Agencies shall not reject applicants for study or after study on the basis of the length of time they have been married, provided that time is at least one year." This regulation was promulgated before the New York State Court of Appeals decisions in *Matter of Jacob* and *Matter of Dana* (86 N.Y.2d 651, 636 N.Y.S.2d 716 [1995]) regarding the ability of unmarried persons to adopt. In those decisions, the court ruled that the unmarried partner of a child's biological mother, who is raising the child together with the child's biological parent, has standing to become the child's second parent through adoption. This regulation also does not take into consideration where two persons have cohabited for a period of time prior to being married, especially in cases where the prospective adoptive parents are seeking approval to adopt a child for whom they have been functioning as the child's foster parents for the past several years.

The other regulation that we have determined needs to be clarified is 18 NYCRR 421.16 (h) (2), which states: "Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children." The *Matter of Dana* decision not only ruled that unmarried persons could adopt together, but it extended this ruling to also include homosexual couples.

In addition, both of the regulations cited above were written before the enactment of Chapter 509 of the Laws of 2010, which amended section 110 of the Domestic Relations Law (DRL) in relation to expressly authorizing two unmarried adult intimate partners, whether heterosexual or homosexual, to adopt a child together. In addition, Chapter 509 replaced references to "husband and wife" with the gender-neutral term "married couple" in section 110. See 11-OCFS-INF-01 for more information on the provisions of Chapter 509.

It is important to recognize that all types of families are potential resources for children awaiting adoption and should be considered as potential adoptive parents. Maturity, self-sufficiency, ability to parent, ability to meet the child's needs, and availability of support systems are the critical assessments in identifying adoptive applicants' appropriateness for specific children.

III. Program Implications

Length of Marriage

OCFS is hereby providing the following clarification of the standards for the application of 18 NYCRR 421.16 (e) regarding length of marriage in determining whether to approve applicants for approval as adoptive parents. If the applicants have been married for less than one year, the LDSS or voluntary authorized agency **may** take the length into consideration when evaluating the applicants. However, the agency cannot deny an applicant **solely** on the basis that the length of marriage is less than one year.

Applicants do not have to be married to adopt. Therefore, restricting married adoptive applicants to those married for a year or more is inconsistent with adoption policy and practice. This restriction imposes a higher standard on married couples than unmarried couples, which is not the intent of the regulation. In addition, the regulation could be interpreted as penalizing those couples who get married after living together. Rather than just considering length of marriage, LDSSs and voluntary authorized agencies may choose to also consider the length of relationship in its totality, including the period of time a couple has been in a relationship prior to marriage. LDSSs and agencies can examine the commitment and stability of the applicants' relationship and their ability to plan and commit to an adoptive child, without using length of marriage as a determining factor.

Sexual Orientation

This INF also provides clarification to 18 NYCRR 421.16 (h) regarding the consideration of homosexuality when completing an adoption study. The intent of this regulation is to prohibit discrimination based on sexual orientation in the adoption study assessment process. In addition, OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent. The capacity of the prospective adoptive parents to meet the needs of children freed for adoption should be the primary consideration when making approval or rejection decisions of an adoptive applicant.

These clarifications are in line with OCFS policy to facilitate the placement of foster children in permanent caring homes when it is in the best interests of the child. The Adoption Services Guide for caseworkers will be revised to reflect these clarifications.

This guide can be accessed from both the OCFS intranet and Internet website. It is located at:
http://www.ocfs.state.ny.us/adopt/adopt_manual/Adoption%20Services%20Guide%20October%202010%20FULL%20booklet.pdf

Disapproval of an Adoptive Applicant

LDSSs and voluntary authorized agencies are reminded of the criteria and notification process when applicants are disapproved for adoption. After the completion of an adoption study based on sound casework principles, an applicant may be disapproved if the agency determines that:

- The applicant(s) is physically incapable of caring for an adopted child;
- The applicant(s) is emotionally incapable of caring for an adopted child; or
- The approval of the applicant(s) would not be in the best interests of the children awaiting adoption. [18 NYCRR 421.15 (g) (2)]

Caseworkers conducting adoption studies must consider the way the bullets above weaken an applicant's ability to care for an adopted child. An approval or rejection must be based on information related to areas of the adoption study listed in 18 NYCRR 421.16. The ways in which these factors were assessed and how they led to the conclusions shown in the adoption study should be carefully and clearly recorded. In addition, caseworkers must consult with their supervisors in relation to the decision to approve or not approve adoptive applicants.

In addition, an applicant must be disapproved if he or she has been convicted of a mandatory disqualifying crime (18 NYCRR 421.27(d)(1).

If a decision is made to not approve adoptive applicants, the applicants must be informed in writing that they have not been approved and the reasons for the rejection. The notification must offer the applicants an opportunity to discuss the decision in person with the caseworker's supervisor. The notification must also include notice to the applicants in boldface type of their right to request and be granted an administrative hearing in accordance with section 372-e of the Social Services Law and must state the procedure to be used for that purpose. The applicant has 60 days from receiving the notice letter to request an administrative hearing [18 NYCRR 421.15 (g) (3) - (7)].

/s/ Nancy Martinez

Issued By:
Name: Nancy Martinez
Title: Director
Division/Office: Strategic Planning and Policy Development

EXHIBIT D

RULE MAKING ACTIVITIES

Each rule making is identified by an I.D. No., which consists of 13 characters. For example, the I.D. No. AAM-01-96-00001-E indicates the following:

AAM -the abbreviation to identify the adopting agency
01 -the *State Register* issue number
96 -the year
00001 -the Department of State number, assigned upon receipt of notice.
E -Emergency Rule Making—permanent action not intended (This character could also be: A for Adoption; P for Proposed Rule Making; RP for Revised Rule Making; EP for a combined Emergency and Proposed Rule Making; EA for an Emergency Rule Making that is permanent and does not expire 90 days after filing.)

Italics contained in text denote new material. Brackets indicate material to be deleted.

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Captive Cervids

I.D. No. AAM-32-13-00001-E
Filing No. 766
Filing Date: 2013-07-17
Effective Date: 2013-07-17

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 68.1(g) of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 72 and 74

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: The rule amends section 68.1(g) of 1 NYCRR to prohibit the importation of captive cervids (deer, elk and moose) into New York State from entities within states where CWD has been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has been detected within the past 60 months.

CWD, Chronic Wasting Disease, is a progressive, fatal, degenerative neurological disease of captive and free-ranging deer, elk, and moose (cervids) that was first recognized in 1967 as a clinical wasting syndrome of unknown cause in captive mule deer in Colorado. CWD belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). The name derives from the pin-point size holes in brain tissue of infected animals which gives the tissue a sponge-like appearance. TSEs include a number of different diseases affecting animals and humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk and moose. There is no known treatment or vaccine for CWD.

The origin of CWD is unknown. The agent that causes CWD and other TSEs has not been completely characterized. However, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The exact mechanism of transmission is unclear. However, evidence suggests that as an infectious and communicable disease, CWD is transmitted directly from one animal to another through saliva, feces, and urine containing abnormal prions shed in those body fluids and excretions. The species known to be susceptible to CWD are Rocky Mountain elk (Cervus canadensis), red deer (Cervus elaphus), mule deer (Odocoileus hemionus), black-tailed deer (Odocoileus hemionus), white-tailed deer (Odocoileus virginianus), sika deer (Cervus nippon), and moose (Alces alces).

CWD is a slow and progressive disease. Because the disease has a long incubation period (1 1/2 to 5 years), deer, elk and moose infected with CWD may not manifest any symptoms for a number of years after they become infected. As the disease progresses, deer, elk and moose with CWD show changes in behavior and appearance. These clinical signs may include progressive weight loss, stumbling, tremors, lack of coordination, excessive salivation and drooling, loss of appetite, excessive thirst and urination, listlessness, teeth grinding, abnormal head posture and drooping ears.

The United States Secretary of Agriculture declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. This prompted the Department in 2004 to adopt regulations which allow for importation of captive cervids from states with confirmed cases of CWD under a health standard and permit system.

Nonetheless, 22 states, including New York, as well as two provinces in Canada have either CWD detections in free ranging deer or have cases of CWD diagnosed in captive deer. Most recently, this past fall, CWD was diagnosed in captive deer in Pennsylvania. Department regulations currently prohibit the importation of CWD susceptible cervids from a CWD infected zone, which is defined as a geographic area, irrespective of state boundaries, in which CWD is present, whether in wild or captive cervids. This rule would amend the definition of CWD infected zone in section 68.1(g) of 1 NYCRR to include (1) any state which has had a diagnosed case of CWD in captive or wild cervids within the past 60 months; (2) any part of a state which is within 50 miles of a site in another state where CWD was diagnosed in a captive or wild cervids within the past 60 months; or (3) any area designated by the Commissioner as having a high risk of CWD contamination.

The regulations are necessary to protect the general welfare. By establishing a five-year look-back for CWD affliction in cervids, the rule would help protect animal health as well as New York's 14 to 21 million dollar captive deer industry and the 750-million dollar wild deer hunting industry.

Based on the facts and circumstances set forth above, the Department has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest.

Subject: Captive cervids.

Purpose: To prevent the further spread of chronic wasting disease in New York State.

Text of emergency rule: Subdivision (g) of section 68.1 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(g) CWD infected zone means [a defined geographic area, irrespective of state boundaries, in which CWD is present, whether in wild or captive cervids]*:*

(1) any state which has had a diagnosed case of CWD in captive or wild cervids within the past 60 months;

(2) any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in captive or wild cervids within the past 60 months; or

(3) any area designated by the Commissioner as having a high risk of CWD contamination.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires October 14, 2013.

Text of rule and any required statements and analyses may be obtained from: David Smith, DVM, Director, Division of Animal Industry, NYS Department of Agriculture and markets, 10B Airline Drive, Albany, New York 12235, (518) 457-3502, email: david.smith@agriculture.ny.gov

Regulatory Impact Statement

1. Statutory authority:

Section 18(6) of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department.

Section 72 of the Law authorizes the Commissioner to adopt and enforce rules and regulations for the control, suppression or eradication of communicable diseases among domestic animals and to prevent the spread of infection and contagion.

Section 72 of the Law also provides that whenever any infectious or communicable disease affecting domestic animals shall exist or have recently existed outside this State, the Commissioner shall take measures to prevent such disease from being brought into the State.

Section 74 of the Law authorizes the Commissioner to adopt rules and regulations relating to the importation of domestic or feral animals into the State.

2. Legislative objectives:

The statutory provisions pursuant to which this rule is being readopted as an emergency measure are aimed at preventing infectious or communicable diseases affecting domestic animals from being brought into the State to control, suppress and eradicate such diseases and prevent the spread of infection and contagion. The rule would further this legislative goal by prohibiting importation of cervids from states or parts of states where CWD has been detected within the past 60 months, thereby protecting animal health and New York's deer industry.

3. Needs and benefits:

The rule prohibits the movement of cervids (deer, elk and moose) from states or parts of states where CWD has been detected within the past 60 months.

CWD, Chronic Wasting Disease, is a progressive, fatal, degenerative neurological disease of captive and free-ranging deer, elk, and moose (cervids) that was first recognized in 1967 as a clinical wasting syndrome of unknown cause in captive mule deer in Colorado. CWD belongs to the family of diseases known as transmissible spongiform encephalopathies (TSEs). The name derives from the pin-point size holes in brain tissue of infected animals which gives the tissue a sponge-like appearance. TSEs include a number of different diseases affecting animals and humans including bovine spongiform encephalopathy (BSE) in cattle, scrapie in sheep and goats and Creutzfeldt-Jacob disease (CJD) in humans. Although CWD shares certain features with other TSEs, it is a distinct disease affecting only deer, elk and moose. There is no known treatment or vaccine for CWD.

The origin of CWD is unknown. The agent that causes CWD and other TSEs has not been completely characterized. However, the theory supported by most scientists is that TSE diseases are caused by proteins called prions. The exact mechanism of transmission is unclear. However, evidence suggests that as an infectious and communicable disease, CWD is transmitted directly from one animal to another through saliva, feces, and urine containing abnormal prions shed in those body fluids and excretions. The species known to be susceptible to CWD are Rocky Mountain elk (Cervus canadensis), red deer (Cervus elaphus), mule deer (Odocoileus hemionus), black-tailed deer (Odocoileus hemionus), white-tailed deer (Odocoileus virginianus), sika deer (Cervus nippon), and moose (Alces alces).

CWD is a slow and progressive disease. Because the disease has a long incubation period (1 ½ to 5 years), deer, elk and moose infected with CWD may not manifest any symptoms of the disease for a number of years after they become infected. As the disease progresses, deer, elk and moose with CWD show changes in behavior and appearance. These clinical signs may include progressive weight loss, stumbling, tremors, lack of coordination, excessive salivation and drooling, loss of appetite, excessive thirst and urination, listlessness, teeth grinding, abnormal head posture and drooping ears.

The United States Secretary of Agriculture declared CWD to be an emergency that threatens the livestock industry of the United States and authorized the United States Department of Agriculture to establish a CWD eradication program. This prompted the Department in 2004 to adopt regulations which allow for importation of captive cervids from states with confirmed cases of CWD under a health standard and permit system. Nonetheless, 22 states, including New York, as well as two provinces in Canada have either CWD detections in free ranging deer or have cases of CWD diagnosed in captive deer. Most recently, this past fall, CWD was diagnosed in captive deer in Pennsylvania.

Department regulations currently prohibit the importation of CWD susceptible cervids from a CWD infected zone, which is defined as a geographic area, irrespective of state boundaries, in which CWD is present, whether in wild or captive cervids. This rule would amend the definition of CWD infected zone in section 68.1(g) of 1 NYCRR to include (1) any state which has had a diagnosed case of CWD in captive or wild cervids within the past 60 months; (2) any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in captive or wild cervids within the past 60 months; or (3) any area designated by the Commissioner as having a high risk of CWD contamination. By establishing a five-year look-back for CWD affliction in cervids, the rule would help protect animal health as well as New York's 14 to 21 million dollar captive deer industry and 750-million dollar wild deer hunting industry.

4. Costs:

(a) Costs to regulated parties:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 25 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of $19,000 to $190,000 ($500 to $5,000 per head). The rule will exclude approximately 50 deer per year from importation, requiring New York entities to purchase deer from entities within New York State, entities within states where CWD has not been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has not been detected within the past 60 months. Sourcing approximately 50 deer from these other locations could increase costs an average of $500 to $2,000 per deer, or $25,000 to $100,000 total. It is anticipated that most of these deer (approximately 40 head) would be purchased in New York State rather than out of state. At $1,000 to $5,000 per deer, New York entities could realize $40,000 to $200,000 in additional income.

(b) Costs to the agency, state and local governments:

There will be no cost to the Department, State or local governments.

(c) Source:

Costs are based upon data from the records of the Department's Division of Animal Industry as well as observations of the deer industry in New York State.

5. Local government mandates:

The amendments would not impose any program, service, duty or other responsibility upon any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

It is anticipated that the rule will not result in any additional paperwork for regulated parties.

7. Duplication:

The rule does not duplicate any State or federal requirements.

8. Alternatives:

Three alternatives were considered.

The first alternative was to leave the current regulatory scheme in place which allows for importation of captive cervids from states with known cases of CWD if the states meet certain health standards and comply with a permitting system under the current regulations. However, this approach was determined to be inadequate given the apparent further spread of CWD in the country. Additionally, deer owners could circumvent New York's current regulation by accessing New York markets through movement of deer through states not subject to the current requirements.

The second alternative was to implement a total ban on importation. Due to the spread of CWD to other states and the threat that this disease poses to the State's captive and wild deer populations, it is clear a total ban on importation of CWD susceptible species would be the best method of preventing another introduction of this disease into New York State. Furthermore, by permitting the disease to be detected and controlled in a more efficient manner, a complete ban on importation would greatly simplify an epidemiologic investigation if a new case of CWD were to occur in New York State at some future date.

The third alternative and the one ultimately implemented in this rule is the prohibition of movement of CWD susceptible species into New York from states which have had a diagnosed case of CWD in captive or wild cervids in the past 60 months or any part of a state which is within 50 miles of a site in another state where CWD has been diagnosed in the past

60 months. It was determined that absent notice and an opportunity for a regulatory hearing, this alternative was the best one to pursue on an emergency basis. However, since a total ban on imports is likely to be the best method to help prohibit the further introduction of CWD in New York, it is anticipated that the total ban set forth in the second alternative will be pursued as a permanent measure at a later date.

9. Federal standards:

The proposed regulations do not exceed any minimum standards of the federal government.

10. Compliance schedule:

The rule will be effective upon filing with the Department of State.

Regulatory Flexibility Analysis

1. Effect of rule:

There are approximately 433 small businesses raising a total of approximately 9,600 captive cervids (the family that includes deer and elk) in New York State.

The rule will have no impact on local governments.

2. Compliance requirements:

Under the rule, regulated parties are prohibited from importing cervids into New York State from entities within states where CWD has been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has been detected within the past 60 months.

The rule will have no impact on local governments.

3. Professional services:

It is not anticipated that regulated parties will have to secure any professional services in order to comply with this rule.

The rule will have no impact on local governments.

4. Compliance costs:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 25 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of $19,000 to $190,000 ($500 to $5,000 per head). The rule will exclude approximately 50 deer per year from importation, requiring New York entities to purchase deer from entities within New York State, entities within states where CWD has not been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has not been detected within the past 60 months. Sourcing approximately 50 deer from these other locations could increase costs an average of $500 to $2,000 per deer, or $25,000 to $100,000 total. It is anticipated that most of these deer (approximately 40 head) would be purchased in New York State rather than out of state. At $1,000 to $5,000 per deer, New York entities could realize $40,000 to $200,000 in additional income.

The rule will have no impact on local governments.

5. Economic and technological feasibility:

The economic and technological feasibility of complying with the rule has been assessed. The rule is economically feasible. Although the regulation may result in deer farmers paying higher prices for deer purchased within the State than they would if they were to purchase deer from out of state, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater. The rule is technologically feasible. The 10 to 15 deer farmers who have purchased deer from outside New York State would still be able to purchase animals within the State as well as from states and parts of states within 50 miles of other states where there have been no CWD detections in the past 60 months.

The rule will have no impact on local governments.

6. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-b(1), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including small businesses. While the rule prohibits approximately 10 to 15 entities from purchasing deer from states with CWD detections within the past 60 months or states within 50 miles of other states with CWD detections within the past 60 months, those entities will still be able to purchase animals from deer farmers within New York as well as from states with no CWD detections within parameters set forth in the rule. Market forces may result in higher prices for these purchasers. However, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater absent the ban set forth in the rule.

The rule will have no impact on local governments.

7. Small business and local government participation:

The Department and the Department of Environmental Conservation (DEC) reached a tentative agreement that any state which has had a case of CWD in the past five years would be defined as a CWD infected zone within the meaning of Part 68 of 1 NYCRR. However, there has not been any outreach yet regarding this rule with regulated parties, although outreach is planned in the near future.

The rule will have no impact on local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The approximately 433 entities raising captive deer in New York State are located throughout the rural areas of New York, as defined by section 481(7) of the Executive Law.

2. Reporting, recordkeeping and other compliance requirements and professional services:

Under the rule, regulated parties are prohibited from importing cervids into New York State from entities within states where CWD has been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has been detected within the past 60 months. There are no reporting and record-keeping requirements required under the rule; nor is it anticipated that regulated parties would have to secure any professional services in order to comply with the rule.

3. Costs:

There are approximately 433 entities raising a total of approximately 9,600 captive deer in New York State. Of these entities, approximately 25 purchase deer from out of state. Last year, 38 head of deer were purchased out of state by these entities at a cost of $19,000 to $190,000 ($500 to $5,000 per head). The rule will exclude approximately 50 deer per year from importation, requiring New York entities to purchase deer from entities within New York State, entities within states where CWD has not been detected within the past 60 months or from any part of a state which is within 50 miles of a site in another state where CWD has not been detected within the past 60 months. Sourcing approximately 50 deer from these other locations could increase costs an average of $500 to $2,000 per deer, or $25,000 to $100,000 total. It is anticipated that most of these deer (approximately 40 head) would be purchased in New York State rather than out of state. At $1,000 to $5,000 per deer, New York entities could realize $40,000 to $200,000 in additional income.

4. Minimizing adverse impact:

In conformance with State Administrative Procedure Act section 202-bb(2), the rule was drafted to minimize economic impact and reporting requirements for all regulated parties, including those in rural areas. While the rule prohibits approximately 10 to 15 entities from purchasing deer from states with CWD detections within the past 60 months or states within 50 miles of other states with CWD detections within the past 60 months, those entities will still be able to purchase animals from deer farmers within New York as well as from states with no CWD detections within parameters set forth in the rule. Market forces may result in higher prices for these purchasers. However, the economic consequences of the infection or exposure to CWD of the approximately 9,600 captive cervids already in the State would be far greater absent the ban set forth in the rule.

5. Rural area participation:

The Department and the Department of Environmental Conservation (DEC) reached a tentative agreement that any state which has had a case of CWD in the past five years would be defined as a CWD infected zone within the meaning of Part 68 of 1 NYCRR. However, there has not been any outreach yet regarding this rule with regulated parties, although outreach is planned in the near future.

The rule will have no impact on local governments.

Job Impact Statement

1. Nature of Impact:

It is not anticipated that there will be an impact on jobs and employment opportunities.

2. Categories and Numbers Affected:

The number of persons employed by the 433 entities engaged in raising captive deer in New York State is unknown.

3. Regions of Adverse Impact:

The 433 entities in New York State engaged in raising captive deer are located throughout the State.

4. Minimizing Adverse Impact:

By helping to protect the approximately 9,600 captive deer currently raised by approximately 433 New York entities from the further introduction of CWD, this rule will help to preserve the jobs of those employed in this agricultural industry.

Assessment of Public Comment

The agency received no public comment since publication of the last assessment of public comment.

Office of Children and Family Services

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Prohibition of Discrimination on the Basis of Sexual Orientation, Gender Identity or Expression

I.D. No. CFS-32-13-00007-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Addition of sections 180.5(a)(6), 421.3(d), 423.4(m)(7) and 441.24; amendment of sections 182-1.5(g)(1), 421.16(e) and (h) of Title 18 NYCRR.

Statutory authority: Executive Law, sections 503 and 532-e; Social Services Law, sections 20(3)(d), 462(1), 372-b(3), 372-e(2), 378(5), 409 and 409-a

Subject: Prohibition of discrimination on the basis of sexual orientation, gender identity or expression.

Purpose: Prohibits discrimination on the basis of sexual orientation, gender identity or expression in essential social services.

Text of proposed rule: A new paragraph (6) of subdivision (a) of section 180.5 of title 9 is added to read as follows:

(6) Staff and volunteers of detention providers shall not engage in or condone discrimination or harassment of youth on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. Detention providers shall promote and maintain a safe environment, take reasonable steps to prevent discrimination and harassment against youth by other youth, promptly investigate incidents of discrimination and harassment by staff, volunteers and youth, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, or other like.

Paragraph (1) of subdivision (g) of section 182-1.5 of title 9 is amended to read as follows:

(1) Each program shall employ policies and procedures designed to ensure that youth are not subject to unlawful discriminatory treatment in any program decision making process or when being considered for any available service. *Program staff and volunteers shall not engage in or condone discrimination or harassment on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. Each program shall promote and maintain a safe environment, take reasonable steps to prevent discrimination and harassment against youth by other youth, promptly investigate incidents of discrimination and harassment by staff, volunteers, and youth, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, or other means.*

A new paragraph (d) is added to section 421.3 to read as follows:

(d) prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and, shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, and other means.

Subdivision (e) of section 421.16 of title 18 is repealed, and the subsequent subdivisions are re-lettered.

[(e) Length of marriage. Agencies shall not reject applicants for study or after study on the basis of the length of time they have been married, provided that time is at least one year.]

Paragraph (2) of subdivision (h) of section 421.16 of title 18 is repealed, paragraph (3) of said subdivision is renumbered paragraph (2) and is amended to read as follows:

(2) [Applicants shall not be rejected solely on the basis of homosexuality. A decision to accept or reject when homosexuality is at issue shall be made on the basis of individual factors as explored and found in the adoption study process as it relates to the best interests of adoptive children.

(3)] Exploration of *a* [sexual] preference[s] *to adopt a child of a particular gender* [and practices of applicants], where found necessary and appropriate, shall be carried out openly with a clear explanation to the applicant of the basis for, and relevance of, the inquiry.

A new paragraph (7) is added to subdivision (m) of section 423.4 of title 18 to read as follows:

(7) Staff and volunteers of agencies providing preventive services shall not engage in discrimination or harassment of families receiving preventive services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. Such agencies shall promote and maintain a safe environment, take reasonable steps to prevent discrimination by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. For the purposes of this section, "gender identity or expression" shall mean having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, or other means.

A new section 441.24 is added to part 441 of title 18 to read as follows:

441.24 Nondiscriminatory treatment.

(a) Authorized agency staff and volunteers shall not engage in or condone discrimination or harassment against prospective foster parents, foster parents or foster children on the basis of race, creed, color, national origin, age, sex, religion, sexual orientation, gender identity or expression, marital status, or disability. Authorized agencies shall promote and maintain a safe environment, take reasonable steps to prevent discrimination and harassment against youth by other youth, promptly investigate incidents of discrimination and harassment by staff, volunteers and youth, and take reasonable and appropriate corrective or disciplinary action when such incidents occur. Certified or approved foster parents shall not engage in discrimination or harassment against foster children on the basis of race, creed, color, national origin, age, sex, religion, sexual orientation, gender identity or expression, marital status, or disability, and shall promote and maintain a safe environment.

(b) For purposes of this section, the term "gender identity or expression'' means having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. "Gender identity" refers to a person's internal sense of self as male, female, no gender, or another gender, and "gender expression" refers to the manner in which a person expresses his or her gender through clothing, appearance, behavior, speech, and other means.

Text of proposed rule and any required statements and analyses may be obtained from: Public Information Office, Office of Children and Family Services, 52 Washington Street, Rensselaer, NY 12210, (518) 473-7793

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement

1. Statutory authority:

Social Services Law § 20(3) authorizes the New York State Office of

Children and Family Services (OCFS) to supervise local social services departments and to establish rules, regulations and policies to carry out these duties. Social Services Law § 462(1) authorizes OCFS to regulate voluntary agencies exercising care or custody of children, and Social Services Law § 378(5) provides the legal basis for regulations governing the issuing and revocation of foster care licenses and certificates and prescribing standards, records, accommodations and equipment for the care of children and minors received under such licenses and certificates. OCFS has the legal authority to regulate preventive services pursuant to Social Services Law §§ 409 and 409-a.

Social Services Law § 372-b(3) authorizes OCFS to promulgate regulations to maintain enlightened adoption policies and establish standards and criteria for adoption practices, and Social Services Law § 372-e(2) authorizes OCFS to establish standards and procedures for evaluating persons who have applied for adoption of a child.

Executive Law § 532-e provides authority for OCFS to approve and regulate programs for runaway and homeless youth, and Executive Law § 503 provides authority for the regulation of secure and non-secure detention.

2. Legislative objectives:

These proposed regulations serve the legislative objective of promoting the safety, permanency, and well-being of families who receive preventive services, and children in foster care, detention and run away and homeless youth programs. The amendments also promote fairness and equality in the child welfare adoption program by eliminating archaic regulatory language that implies the sexual orientation of gay, lesbian and bisexual prospective adoptive parents – but not of heterosexual prospective adoptive parents -- is relevant to evaluating their appropriateness as adoptive parents.

The proposed regulation would better promote the safety and well-being of such families and children by prohibiting discrimination and harassment on the basis of sexual orientation and gender identity and expression.

3. Needs and benefits:

The proposed regulatory amendments require program staff and volunteers to refrain from engaging in discrimination or harassment on the basis of sexual orientation, or gender identity or expression. They further require that program staff and volunteers take reasonable steps to prevent discrimination against youth by other youth, investigate incidents of discrimination and harassment promptly, and take all reasonable and appropriate corrective or disciplinary action when such incidents occur. The proposed amendments also eliminate archaic regulatory language, which implies that the sexual orientation of gay, lesbian and bisexual prospective adoptive parents – but not that of heterosexual prospective adoptive parents -- is relevant to evaluating their appropriateness as adoptive parents.

The proposed regulation is needed to allow OCFS to fully implement LGBTQ best practices in child welfare, detention and run away and homeless youth programs.

4. Costs:

There are no costs associated with the proposed regulation. While training on LGBTQ best practices will support implementation of the proposed regulatory amendments, the proposed regulatory amendments do not impose training requirements. Further, OCFS has provided, and anticipates that it will continue to provide, training to local departments of social services, voluntary agencies, and others on this topic. Additionally, many advocacy and educational organizations provide LGBTQ training for child welfare, juvenile justice and related programs at no cost.

5. Local government mandates:

This proposal prohibits counties and local departments of social services (LDSSs) that operate detention facilities, foster care programs, or provide preventive services from discriminating against program participants and service recipients on the basis of sexual orientation or gender identity or expression, and requires that they investigate acts of discrimination or harassment by staff and volunteers and take appropriate and reasonable corrective action in response thereto. The majority of detention and foster care programs are provided by voluntary agencies and the majority of preventive services are provided by not-for-profit entities. Counties and LDSSs are already prohibited from discriminating in the provision of social services on the other bases addressed by the regulations, and OCFS believes that most counties and LDSSs already prohibit discrimination on the basis of sexual orientation and gender identity and expression in the provision of these services.

The proposal also imposes a mandate on local departments of social services who contract with agencies for the provision of preventive services to include such anti-discrimination requirements in these contracts. OCFS does not anticipate that this requirement will limit the pool of available preventive service providers or affect the cost of these contracts.

6. Paperwork:

The proposed regulation requires no additional paperwork.

7. Duplication:

The proposed regulation does not duplicate other state or federal requirements.

8. Alternatives:

The regulatory amendment is necessary to promote and maintain a safe environment for lesbian, gay, bisexual, transgender and questioning youth, families and prospective adoptive parents. OCFS has issued guidelines within existing regulatory authority, but these regulatory amendments are necessary to promote best practices with this population.

9. Federal standards:

While federal statutes and regulations do not prohibit discrimination against youth in care or families receiving the enumerated services on the basis of sexual orientation, or gender identity or expression, the proposed regulations are not inconsistent with federal standards.

10. Compliance schedule:

The proposed regulation will take effect upon enactment. OCFS anticipates that it will issue policy directives to affected entities providing implementation guidance.

Regulatory Flexibility Analysis

1. Effect of rule:

The proposed regulation prohibits discrimination or harassment on numerous grounds, including sexual orientation, gender identity, and gender expression, by detention facilities, foster care homes and facilities, runaway and homeless programs, and preventive services providers. Detention facilities are operated by counties or by not-for-profit entities. In most cases preventive services are provided by not-for-profit entities, which may be small businesses; they also may be provided by local departments of social services (LDSSs). Foster care facilities are operated by voluntary authorized agencies, which may be small businesses.

2. Compliance requirements:

The proposed regulation requires counties, LDSSs, and authorized agencies to refrain from engaging in discrimination or harassment on the basis of sexual orientation, or gender identity or expression, take reasonable steps to prevent discrimination against youth by other youth, investigate incidents of discrimination and harassment by staff, volunteers and youth promptly, and take all reasonable and appropriate corrective or disciplinary action when such incidents occur.

3. Professional services:

OCFS anticipates that it will provide technical guidance and training on best practices associatedwith these regulations.

4. Compliance costs:

This proposal has no economic impact on small businesses and local government. Although training on LGBTQ best practices will support implementation of the proposed regulatory amendments, training requirements are not imposed. Further, OCFS has provided and anticipates that it will continue to provide training to LDSSs, voluntary agencies, and others on this topic. Additionally, many advocacy and educational organizations provide LGBTQ training for child welfare, juvenile justice and related programs at no cost.

5. Economic and technological feasibility:

The proposal is economically and technically feasible. There is no economic impact, and authorized agencies, counties and LDSSs may use whatever procedures are already in place for preventing and correcting prohibited behavior to comply. As noted, there are many sources of training to implement best practices available at no cost.

6. Minimizing adverse impact:

The proposal has no adverse impact.

7. Small business and local government participation:

During development of the informational letter on non-discrimination against LGBTQ youth in the child welfare system, OCFS conferred with representatives of authorized agencies, run away and homeless youth programs, and LDSSs. All of these entities were supportive of the development of non-discrimination standards.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed regulation affects the City of New York and all of the counties in New York which operate as local departments of social services (LDSSs) and which may provide detention services, as well as authorized agencies and not-for-profit entities that operate foster care detention, or run away and homeless youth programs, or provide preventive services within those counties. Many of these counties and these agencies are located in rural areas.

2. Reporting, recordkeeping and other compliance requirements and professional services:

The proposed regulation imposes no reporting or recordkeeping requirements.

3. Costs:

The proposal imposes no costs. While training on LGBTQ best practices will support implementation of the proposed regulatory amendments, the proposed regulatory amendments do not impose training requirements.

Further, OCFS has provided, and anticipates it will continue to provide, training to local departments of social services, voluntary agencies, and others on this topic. Additionally, many advocacy and educational organizations provide LGBTQ training for child welfare, juvenile justice and related programs at no cost.

4. Minimizing adverse impact:

The proposal has no adverse impact.

5. Rural area participation:

During development of the informational letter on non-discrimination against LGBTQ youth in the child welfare system, OCFS conferred with representatives of authorized agencies, run away and homeless youth programs, and LDSSs, some of which were located in rural areas. All of these entities were supportive of the development of non-discrimination standards.

Job Impact Statement

The proposal prohibits discrimination on the basis of sexual orientation, gender identity and expression. Agencies will likely choose to engage in training to better understand and prevent these forms of discrimination. Such training is currently available at no cost from OCFS and not-for-profit agencies. It is possible that not-for-profit agencies that currently provide LGBTQ non-discrimination training will need to hire additional staff to provide training to the numerous service providers subject to the proposed regulations.

Division of Criminal Justice Services

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Probation Case Record Management

I.D. No. CJS-32-13-00014-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of Part 348 of Title 9 NYCRR. This rule is proposed pursuant to SAPA § 207(3), 5-Year Review of Existing Rules.

Statutory authority: Executive Law, section 243(1)

Subject: Probation Case Record Management.

Purpose: To establish minimum state standards regarding probation case record management.

Substance of proposed rule (Full text is posted at the following State website:www.criminaljustice. ny.gov): The proposed rule amendments revise Part 348 governing Case Record Management of probation department records governing probation service delivery. Below is a brief summary of the regulatory provisions.

Section 348.1 is the definitional section. It deletes unnecessary language and clarifies that records may be written and/or electronic.

Sections 348.2-348.4 have been renumbered Sections 348.4-348.6 respectively.

New Section 348.2 sets forth the Objective which is to establish minimum state standards regarding probation case record management.

New Section 348.3 governs applicability and provides that Part 348 is applicable to all probation departments in New York State.

Section 348.4 governs content of case records. Clarified is that records may be maintained and an index filing system established in an automated case management system. Other provisions provide more specificity as to minimum information and/or documents which should be in the case record. Additional language emphasizes that appropriate protections shall be instituted to safeguard records, electronic or otherwise prepared, transmitted, and stored.

Section 348.5 sets forth supervision recordkeeping requirements and has been updated to remove obsolete language and replace it with terminology in the new DCJS Supervision rule which took effect June 1, 2013.

Section 348.6 governs accessibility of case records. It has been expanded to clarify additional instances when certain probation case records must be made accessible pursuant to law and other times when probation records may be legally accessible and parameters governing such access. Specific changes reflect recent statutory laws and/or are being incorporated to address confusion. Overall changes in this section should foster greater probation understanding of when record sharing is mandatory or permissible, terms and conditions with respect to access, lead to greater collaboration where authorized, and maintain safeguards to protect confidentiality and guarantee against inappropriate access. Further, greater flexibility in the area of research, by recognizing bona fide research provided by a private entity, should lead to additional research in the area of probation services which can prove helpful to probation management in terms of assessing their current program services and/or needs and planning future service delivery.

Text of proposed rule and any required statements and analyses may be obtained from: Linda J. Valenti, Assistant Counsel, New York State Division of Criminal Justice Services, A.E. Smith Building, 80 South Swan Street, Room 832, Albany, New York 12210, (518) 457-8413, email: linda.valenti@dcjs.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

Review of Existing Rules: There exist various state and federal laws governing confidentiality, access and release of information which are typically contained in probation case records. These proposed regulatory amendments to 9 NYCRR Part 348 conform with existing laws governing confidentiality of certain case record information and provide probation departments with greater flexibility to communicate more effectively and better manage those under their supervision. Public safety and the general welfare of the public will be served by adoption of these regulatory amendments.

These regulatory amendments clarify rule language governing mandatory sharing of probation case record information in an effort to assist practitioners in fulfilling their responsibilities under law. Further, additional rule language clarifies discretionary sharing of probation case record information authorized in existing law and also expands upon probation's ability to share and/or otherwise disclose certain case record information to particular individuals or entities for public safety and/or case management purposes. Additional flexibility in the area of research will foster greater collaboration and assessment between probation and academia to assist them in analysis of probation needs and programmatic changes that will improve service delivery.

Moreover, these regulatory amendments address a need to promote community corrections by affording probation departments the ability to authorize greater probation record access to assist them in carrying out their official duties. The amendments retain necessary language to guard against inappropriate access to records which are otherwise sealed or not accessible under state or federal law. The regulatory changes in this area are consistent with good professional practice, are in the best interest of the state and local government since they address and optimize public and victim safety, promote greater offender accountability, facilitate better communication by probation departments, clarify certain constraints in law and establish appropriate safeguards to guarantee more uniform application.

Additionally, certain regulatory language has been updated to reflect recent statutory or regulatory changes and to avoid confusion. For example, mandatory and discretionary record sharing provisions have been expanded to reflect new statutory provisions governing access and/or disclosure of certain probation records relative to specific entities. Further, supervision recordkeeping requirements have been updated to remove obsolete language and replace it with terminology in the new DCJS Supervision rule which took effect June 1, 2013.

With respect to technology, revised regulatory language clarifies that probation case records may be written and/or electronic and that records may be maintained and an index filing system established in an automated case management system. Additional language emphasizes that appropriate protections shall be instituted to safeguard records, electronic or otherwise prepared, transmitted, and stored.

Regulatory Impact Statement

1. Statutory authority:

Executive Law section 243(1) empowers the Commissioner of the Division of Criminal Justice Services to promulgate rules "which shall regulate methods and procedure in the administration of probation services", including but not limited to "supervision, case work, recordkeeping… and research so as to secure the most effective application of the probation system and the most efficient enforcement of the probation laws throughout the state."

2. Legislative objectives:

These regulatory amendments are consistent with the legislative intent that the Commissioner adopt regulations in areas relating to critical probation functions. They promote consistent professional standards governing the administration and delivery of probation services in the area of case records management.

There exist various state and federal laws governing confidentiality, access and release of information which are typically contained in probation

case records. These regulatory amendments conform with existing laws governing confidentiality of certain case record information and provide probation departments with greater flexibility to communicate more effectively and better manage those under their supervision. Public safety and the general welfare of the public will be served by adoption of these regulatory amendments.

3. Needs and benefits:

These regulatory amendments clarify rule language governing mandatory sharing of probation case record information in an effort to assist practitioners in fulfilling their responsibilities under law. Further, additional rule language clarifies discretionary sharing of probation case record information authorized in existing law and also expands upon probation's ability to share and/or otherwise disclose certain case record information to particular individuals or entities for public safety and/or case management purposes. Additional flexibility in the area of research will foster greater collaboration and assessment between probation and academia to assist them in analysis and programmatic changes that will improve service delivery.

More comprehensive provisions in the area of case record management, including establishment and dissemination of local policies and procedures will prove beneficial in terms of compliance with existing laws, improving professional communication for public safety and/or case management purposes, facilitating probation research, and addressing other areas of public concern.

Moreover, these regulatory amendments address a need to promote community corrections by affording probation departments the ability to authorize greater probation record access to assist them in carrying out their official duties. The amendments retain necessary language to guard against inappropriate access to records which are otherwise sealed or not accessible under state or federal law. The regulatory changes in this area are consistent with good professional practice, are in the best interest of the state and local government since they address and optimize public and victim safety, promote greater offender accountability, facilitate better communication by probation departments, clarify certain constraints in law and establish appropriate safeguards to guarantee more uniform application.

4. Costs:

These changes are procedural in nature and may require some in-service training or instruction to conform with this revised regulation and updated local policies and procedures or in lieu thereof a local memorandum distributed to staff to clarify any changes. However, we do not foresee these regulatory reforms leading to significant additional costs to probation departments. Clearly, any minimal costs are significantly outweighed by increased public safety interests and offender accountability provided by these new provisions.

5. Local government mandates:

These regulatory amendments enhance current regulatory provisions governing release of case records consistent with laws governing access and confidentiality. We do not anticipate these new requirements will be burdensome or costly.

The Division circulated several prior drafts of these regulatory amendments to the Council of Probation Administrators (the statewide professional association of probation administrators), who assigned it to a specific committee for review and the State Probation Commission, the state advisory body to the Division relative to probation operations. All probation directors further received these drafts for review and comment. We incorporated in these amendments certain verbal and written suggestions raised by probation professionals to address problems which they experienced and to clarify certain provisions in law.

Overall, the Division has received support from probation agencies that these amendments are manageable and consistent with good professional practice.

6. Paperwork:

The proposed rule may lead to additional paperwork or electronic recordkeeping, although minimal in content with respect to establishing or expanding local procedures to address new regulatory language. However, the existing index file requirement has been eliminated, thereby mitigating some recordkeeping requirements.

7. Duplication:

This proposed rule does not duplicate any State or Federal law or regulation. It clarifies and reinforces certain laws with respect to confidentiality and access to probation case record and helps achieve greater flexibility where necessitated.

8. Alternatives:

In view of the need to establish enhanced minimum standards relative to case records to achieve greater offender accountability and probation operational flexibility, to better protect public and victim safety, and facilitate better case management, no other regulatory amendment alternatives were determined appropriate.

9. Federal standards:

There are certain federal standards governing confidentiality and access of certain documents contained in case records and these regulatory amendments are consistent with these requirements.

10. Compliance schedule:

Through prompt dissemination and because amendments are not unduly burdensome, local departments should be able to promptly implement these amendments.

Regulatory Flexibility Analysis

1. Effect of Rule:

The proposed rule amendments revise existing regulatory procedures in the area of Probation Case Record Management.

The proposed amendments will better assist probation departments in carrying out day-to-day operations with respect to case record management. It will afford them with certain additional relief with respect to flexibility of maintenance, reporting, and sharing of probation case records so as to take into consideration local needs, resources, and practices. Proposed regulatory changes will help foster compliance with laws governing mandatory sharing of probation records and those governing confidentiality, yet provide operational flexibility to engage in greater communication on a professional case-by-case and need-to-know basis with respect to certain individual case records and maintain adherence with applicable laws restricting or prohibiting access.

No small businesses are impacted by these proposed regulatory amendments.

2. Compliance Requirements:

Local probation departments should have no problem in complying with the proposed regulatory changes as they afford mandate relief. Through prompt dissemination to staff, local departments will be able to promptly implement these amendments and readily comply. These regulatory amendments shall take effect as soon as they are published in the State Register under a Notice of Adoption. There are no small business compliance requirements imposed by these proposed rule amendments.

3. Professional Services:

No professional services are required upon probation departments to comply with the proposed rule changes. There are no professional services required of small business associated with these proposed rule amendments.

4. Compliance Cost:

DCJS does not anticipate any additional costs or new annual costs required to comply with these regulatory changes. Any minimal costs which a probation department may incur are significantly outweighed by increased public and victim safety interests and offender accountability provided by these new provisions.

5. Economic and Technological Feasibility:

There are no economic or technological issues or problems arising from these proposed regulatory reforms in this area.

6. Minimizing Adverse Impacts:

DCJS foresees that these amendments will have no adverse impact on any jurisdiction. As noted in more detail below, OPCA collaborated with jurisdictions across the state and probation professional associations in soliciting feedback as to the proposed regulatory changes in order to provide sound probation mandate relief. The proposed changes afford greater flexibility in current regulatory requirements with respect to probation case records consistent with public safety and good professional practice.

As the probation case record management rule does not impact upon small business, the proposed changes have no negative impact upon small business operations.

7. Small Business and Local Government Participation:

As this rule does not impact upon small businesses, there was no business involvement with respect to the proposed regulatory changes.

With respect to the proposed regulatory changes upon probation departments and their participation, pursuant to Executive Order No. 17, in October 2009 a review of all rules and regulations was disseminated to all probation departments, the Council of Probation Administrators (COPA) (which is the statewide professional association of probation directors), the New York State Probation Officers Association (NYSPOA), the New York State Association of Counties (NYSAC), the State Probation Commission, and the Division of the Budget (DOB). Additionally, an October 26, 2009 meeting was convened in Albany which over a dozen probation departments (representative of rural, urban, and suburban counties), COPA and NYSPOA Presidents, NYSAC, and DOB representatives attended and where staff went over all rules and regulations and reviewed them individually, discussed proposed regulatory changes, and solicited feedback from the audience. The Director of Probation and Correctional Alternatives previously communicated that there was overwhelming support for the proposed regulatory changes in the area of probation case record management from rural, urban, and suburban jurisdictions.

In recent months, OPCA circulated for comment several prior drafts of this regulatory reform to all probation directors and the State Probation

Commission as well as COPA, and other professional associations. The current amendments incorporate many verbal and written suggestions from probation professionals across the state to address problems which probation departments experience in the area of case records and supervision and to clarify certain procedural provisions and existing laws governing confidentiality and access to probation case records. More flexibility in disclosing certain case record information was sought, along with a clearer explanation of the circumstances under which case record information must and in other instances can be disclosed. The Division did not find significant differences between urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas:

Forty-four local probation departments are located in rural areas and will be affected by the amendments.

2. Reporting, recordkeeping, and other compliance requirements, and professional services:

The proposed changes impose no new reporting, recordkeeping, other compliance requirements nor any professional services with respect to probation management operations. Rural counties will benefit from the proposed regulatory changes as it will afford their respective probation departments greater flexibility in managing probation operations consistent with local practice and resources. These regulatory amendments strengthen procedural requirements and improve probation practice, yet should not impose significant additional costs. There are no professional services needed in any rural area to comply with these regulatory changes. These regulatory amendments retain one current reporting requirement with respect to a probation department approving a bona fide research project. When this occurs, which is infrequently, a copy of the final research project must be submitted to the Division of Criminal Justice Services (DCJS). This requirement is not onerous. Additionally, the retention of language specifying written policies and procedures governing release of case records may require some minor refinement, but it is normal business activities of any agency and in keeping with good professional practice.

These case record rule amendments will improve compliance with state laws governing access to records, enhance probation communications, achieve greater offender accountability and help promote public and victim safety.

3. Costs:

DCJS does not anticipate any additional costs or new annual costs required to comply with these regulatory changes. Any minimal costs which a probation department may incur are significantly outweighed by increased public and victim safety interests and offender accountability provided by these new provisions.

4. Minimizing adverse impact:

DCJS foresees that these regulatory amendments will have no adverse impact on any jurisdiction, including rural areas. As noted in more detail below, OPCA collaborated with jurisdictions across the state, including rural areas, and probation professional associations with rural membership in soliciting feedback as to the proposed regulatory changes in order to provide sound probation mandate relief. The proposed changes afford greater flexibility in current regulatory requirements with respect to probation case records consistent with public safety and good professional practice.

5. Rural area participation:

With respect to the proposed regulatory changes governing probation management, pursuant to Executive Order No. 17, an initial Internal Rule Review Finding was prepared in October 2009 of all rules and regulations and disseminated to all probation departments, the Council of Probation Administrators (COPA) (which is the statewide professional association of probation directors), the New York State Probation Officers Association (NYSPOA), the New York State Association of Counties (NYSAC), the State Probation Commission, and the Division of the Budget (DOB). Additionally an October 26, 2009 meeting was convened in Albany which over a dozen probation departments (representative of rural, urban, and suburban counties), COPA and NYSPOA Presidents, NYSAC, and DOB representatives attended and where staff went over all rules and regulations and reviewed them individually, discussed proposed regulatory changes, and solicited feedback from the audience. The Director of Probation and Correctional Alternatives previously communicated that there was overwhelming support for the proposed regulatory changes in the area of probation case record management from rural, urban, and suburban jurisdictions.

In recent months, OPCA circulated for comment several prior drafts of this regulatory reform to all probation directors and the State Probation Commission as well as COPA, and other professional associations. The current regulatory amendments incorporate many verbal and written suggestions from probation professionals, including rural entities, across the state to address problems which probation departments experience in the area of case records and supervision and to clarify certain procedural provisions and existing laws governing confidentiality and access to probation case records. More flexibility in disclosing certain case record information was sought, along with a clearer explanation of the circumstances under which case record information must and in other instances can be disclosed. The Division did not find significant differences between urban, rural, and suburban jurisdictions as to issues raised or suggestions for change.

Job Impact Statement

A job impact statement is not being submitted with these regulations because it will have no adverse effect on private or public jobs or employment opportunities. The revisions are procedural in nature and clarify laws governing confidentiality and case records and provides for certain additional flexibility where permissible and appropriate. These changes are not onerous in nature and can be implemented through correspondence, in-service training, or instruction to probation staff.

Education Department

EMERGENCY RULE MAKING

State Student Assessments in the Elementary and Secondary Grades

I.D. No. EDU-19-13-00005-E
Filing No. 771
Filing Date: 2013-07-22
Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 8 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided) and 209(not subdivided)

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Pursuant to the New York State Constitution and the Education Law, the Board of Regents is responsible for the general supervision of all educational activities within the State. Included among these activities is the authority to, for example, establish "examinations as to attainments in learning" (Education Law § 207) and "examinations in studies furnishing a suitable standard of graduation" (Education Law § 209).

The proposed amendment is necessary to clarify the Board of Regents' authority to approve the State-designated performance levels or cut scores for determining proficiency on State assessments administered to students in the elementary and secondary grades, which are established by the Commissioner.

The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the Common Core Learning Standards (CCLS), at its January 2011 meeting. The first State assessments to measure student progress on the CCLS were administered in April 2013 for Grades 3-8 ELA and math. Following the administration of the new tests, the Department will use a research-based methodology to set cut scores and performance standards for the tests, which must be approved by the Board of Regents. Beginning with ELA and Algebra I in June 2014, Regents Examinations that measure student progress on the CCLS will be phased in during a transition period. Similar performance-standard setting processes will occur after the initial administration of each new Regents Examination.

The proposed amendment was adopted as an emergency rule at the April 22-23, 2013 Regents meeting, effective April 23, 2013. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on May 8, 2013.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment can be presented for permanent adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the July 22-23, 2013 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed amendment, if adopted at the July meeting, would be August 7, 2013, the date a Notice of Adoption would be published in the State Register. However, the April

emergency rule will expire on July 21, 2013, 90 days from its filing with the Department of State on April 23, 2013. A lapse in the effective date of the rule may disrupt administration of State Assessments, other than Regents examinations, for elementary and secondary education.

Emergency action is therefore necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the April 22-23, 2013 Regents meeting remains continuously in effect until the effective date of its permanent adoption.

It is anticipated that the proposed amendment will be presented to the Board of Regents for adoption on a permanent basis at the July 22-23, 2013 Regents meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by SAPA.

Subject: State student assessments in the elementary and secondary grades.

Purpose: To clarify procedures for establishment of cut scores and performance standards for determining proficiency on State Assessments.

Text of emergency rule: 1. The Title of Part 8 of the Rules of the Board of Regents is amended, effective July 22, 2013, to read as follows:

REGENTS EXAMINATIONS *AND OTHER STATE ASSESSMENTS*

2. Section 8.3 of the Rules of the Board of Regents is amended, effective July 22, 2013, to read as follows:

8.3 Passing mark *or State designated performance level*

1. Except as [provided] *prescribed* in section [100.5(a)(5)(i)] *100.5* of this Title, the minimum passing [mark] *score* in Regents examinations shall be 65 [percent] *or such other minimum passing score as approved by the Board of Regents*.

2. The State designated performance level or cut score for determining proficiency on all State student assessments in the elementary and secondary grades, other than Regents examinations, shall be established by the Commissioner subject to approval by the Board of Regents.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-19-13-00005-EP, Issue of May 8, 2013. The emergency rule will expire September 19, 2013.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law § 101 continues existence of Education Department, with Board of Regents as its head, and authorizes Regents to appoint Commissioner of Education as Department's Chief Administrative Officer, which is charged with general management and supervision of all public schools and educational work of State.

Education Law § 207 empowers Regents and Commissioner to adopt rules and regulations to carry out State education laws and functions and duties conferred on Department.

Education Law § 208 authorizes the Regents to establish examinations as to attainments in learning, and award and confer suitable certificates, diplomas and degrees on persons who satisfactorily meet the requirements prescribed.

Education Law § 209 authorizes the regents to establish examinations in studies furnishing a suitable standard of graduation therefrom and of admission to colleges, and to confer certificates or diplomas on students who satisfactorily pass such examinations.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the Regents authority under the above statutes, in particular, their authority to establish ''examinations as to attainments in learning'' (Education Law § 208) and ''examinations in studies furnishing a suitable standard of graduation'' (Education Law § 209).

3. NEEDS AND BENEFITS:

Currently, the Rules of the Board of Regents and the Regulations of the Commissioner of Education do not address the process for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education other than the Regents examinations. The Department's past practice has been to submit the State-designated performance levels or cut scores to the Board of Regents for their review, but questions have been raised about the process that will be used for designation of the State-designated performance levels for the 2012-2013 grades 3-8 State assessments that are being administered in April 2013. The proposed amendment to the Rules of the Board of Regents would codify the Department's past practice by clarifying that the State-designated performance level or cut score for determining proficiency on all State assessments administered to students in the elementary and secondary grades, other than Regents examinations, shall be established by the Commissioner subject to approval by the Board of Regents.

The Board of Regents adopted the Common Core State Standards (CCSS) for English Language Arts & Literacy and Mathematics at its July 2010 meeting and incorporated New York-specific additions, creating the Common Core Learning Standards (CCLS), at its January 2011 meeting. The first State assessments to measure student progress on the CCLS are being administered in April 2013 for Grades 3-8 ELA and math. Following the administration of the new tests, the Department will use a research-based methodology to set cut scores and performance standards for the tests, which must be approved by the Board of Regents. Beginning with ELA and Algebra I in June 2014, common-core aligned Regents Examinations will be phased in during a transition period. Similar performance-standard setting processes will occur after the initial administration of each new Regents Examination.

With respect to Regents examinations, the passing scores are specified in section 100.5 of the Regulations of the Commissioner. The proposed amendment makes needed technical changes to the existing language of Regents Rule 8.3, which currently references section 100.5(a)(5)(i) only, to broaden the cross-reference to capture provisions recently added to section 100.5 related to the special education safety net which specify passing scores for certain students. The amendments also clarify that while 65 remains the minimum passing score on Regents examinations, with the exceptions set forth in section 100.5, it is no longer a percentage. Finally, in order to reflect the upcoming transition to Regents Exams that measure student progress on the CCLS, which may not be scored on a 0-100 scale, the amendment clarifies that the Board of Regents may prescribe a different minimum passing score.

4. COSTS:

The proposed amendment will not impose any costs on the State, local governments, private regulated parties, or the State Education Department.

The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon school districts, charter schools or other local governments. The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

6. PAPERWORK:

The proposed amendment does not impose any additional reporting, record keeping or other paperwork requirements upon school districts or charter schools. The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

7. DUPLICATION:

The proposed amendment does not duplicate any existing State or Federal requirements.

8. ALTERNATIVES:

There are no significant alternatives and none were considered. The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

9. FEDERAL STANDARDS:

There are no applicable Federal standards.

10. COMPLIANCE SCHEDULE:

It is anticipated that compliance may be achieved by the effective date of the proposed amendment, which does not impose any additional costs or compliance requirements on local governments and private regulated parties, and merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments of student proficiency in elementary and secondary education other than Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents.

The proposed amendment does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Governments:

1. EFFECT OF RULE:

The proposed amendment applies to each school district, board of cooperative educational services (BOCES) and charter schools in the State. At present, there are 695 school districts (including New York City) and 37 BOCES. There are currently approximately 190 charter schools.

2. COMPLIANCE REQUIREMENTS:

The proposed amendment does not impose any additional compliance requirements on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes needed technical changes to the existing language of Regents Rule 8.3, which currently references section 100.5(a)(5)(i) only, to broaden the cross-reference to capture provisions recently added to section 100.5 related to the special education safety net which specify passing scores for certain students. The amendments also clarify that while 65 remains the minimum passing score on Regents examinations, with the exceptions set forth in section 100.5, it is no longer a percentage. Finally, in order to reflect the upcoming transition to Regents Exams that measure student progress on the CCLS, which may not be scored on a 0-100 scale, the amendment clarifies that the Board of Regents may prescribe a different minimum passing score.

3. PROFESSIONAL SERVICES:

The proposed amendment will not impose any additional professional services requirements.

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional costs or technological requirements.

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed amendment have been provided to District Superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

8. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment does not impose any additional compliance requirements or costs on regulated parties. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts, boards of cooperative educational services (BOCES) and charter schools in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less. There is currently one charter school located in a rural area.

2. REPORTING, RECORDKEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional compliance requirements on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes needed technical changes to the existing language of Regents Rule 8.3, which currently references section 100.5(a)(5)(i) only, to broaden the cross-reference to capture provisions recently added to section 100.5 related to the special education safety net which specify passing scores for certain students. The amendments also clarify that while 65 remains the minimum passing score on Regents examinations, with the exceptions set forth in section 100.5, it is no longer a percentage. Finally, in order to reflect the upcoming transition to Regents Exams that measure student progress on the CCLS, which may not be scored on a 0-100 scale, the amendment clarifies that the Board of Regents may prescribe a different minimum passing score.

The proposed amendment will not impose any additional professional services requirements.

3. COSTS:

The proposed amendment does not impose any additional costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any additional compliance requirements or costs on regulated parties but merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment also makes technical and clarifying changes.

The proposed amendment relates to State-designated performance levels or cut scores for purposes of determining student proficiency on State Assessments that are administered to students throughout the State, including those in rural areas. Such standards, of necessity, must be uniform throughout the State. Therefore, it was not possible to establish different requirements or exemptions for rural areas.

5. RURAL AREA PARTICIPATION:

Comments on the proposed amendment were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments in elementary and secondary education, other than the Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents. The proposed amendment does not impose any additional compliance requirements or costs on regulated parties. Accordingly, there is no need for a shorter review period. The Department invites public com-

ment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment merely codifies the State Education Department's past practice for approval of State-designated performance levels or cut scores on State assessments of student proficiency in elementary and secondary education other than Regents examinations, by clarifying that the performance level or cut score shall be established by the Commissioner subject to approval by the Board of Regents.

The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Coursework or Training in Harassment, Bullying and Discrimination Prevention and Intervention

I.D. No. EDU-32-13-00006-EP

Filing No. 778

Filing Date: 2013-07-23

Effective Date: 2013-07-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Proposed Action: Amendment of sections 80-1.13, 80-3.5, 80-5.14 and 80-5.22 of Title 8 NYCRR.

Statutory authority: Education Law, sections 14(5), 207(not subdivided), 305(1), (2), 3004(1) and 3007(not subdivided); and L. 2013, ch. 90

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law §§ 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

Thereafter, in June 2012, the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.
- A new Subpart 57-4 of the Commissioner's Regulations shall be added to establish standards under which the Department will approve providers of this training.
- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of coursework or training in Harassment, Bullying and Discrimination Prevention and Intervention.

At its May meeting, the Board of Regents adopted regulations to implement the recommendations of the Work Group. However, since the Department was consulting with the Work Group for the last several months to develop a syllabus for the 6-hour training course and the syllabus and provider applications only became available in the last couple of months, there was not sufficient access to the training before the July 1 deadline. As a result, on June 30, 2013, the Governor signed Chapter 90 of the Laws of 2013, extending the timeframe for school professionals to complete the training until December 31, 2013. The proposed amendment implements the new law, by extending the timeframe to complete the training from July 1 to December 31, 2013.

Emergency action is necessary for preservation of the general welfare to immediately implement the new law and to ensure that applicants for certification are notified that that the deadline for the training requirements has been extended from July 1, 2013 to December 31, 2013.

Subject: Coursework or training in harassment, bullying and discrimination prevention and intervention.

Purpose: To conform the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013.

Text of emergency/proposed rule: 1. Section 80-1.13 of the Regulations of the Commissioner of Education is amended, effective July 23, 2013, as follows:

80-1.13 Required study in harassment, bullying and discrimination prevention and intervention.

All candidates for a certificate or license valid for an administrative or supervisory service, classroom teaching service or school service who apply for a certificate or license on or after [July 1, 2013] *December 31, 2013*, shall have completed at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of course work or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law, which is provided by a registered program leading to certification pursuant to section 52.21 of this Title or other approved provider pursuant to Subpart 57-4 of this Title.

2. Subparagraph (i) of paragraph (1) of subdivision (b) of section 80-3.5 of the Regulations of the Commissioner of Education is amended, effective July 23, 2013, as follows:

(i) Education. The candidate shall complete at least two clock hours of course work or training regarding the identification and reporting suspected child abuse or maltreatment, in accordance with requirements of section 3004 of the Education Law. In addition, the candidate who applies for the certificate on or after February 2, 2001, shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

3. Subparagraph (i) of paragraph (2) of subdivision (b) of section 80-3.5 of the Regulations of the Commissioner of Education is amended, effective July 23, 2013, as follows:

(i) Education. The candidate shall complete at least two clock hours of course work or training regarding the identification and reporting suspected child abuse or maltreatment, in accordance with requirements of section 3004 of the Education Law. In addition, the candidate who applies for the certificate on or after February 2, 2001, shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

4. Paragraph (1) of subdivision (b) of section 80-5.14 of the Regulations of the Commissioner of Education is amended, effective July 23, 2013, to read as follows:

(1) Education. A candidate shall hold a graduate academic or graduate professional degree from a regionally accredited institution of higher education or from an institution authorized by the Board of Regents to confer degrees. A candidate shall complete study in the means for identifying and reporting suspected child abuse and maltreatment, which shall include at least two clock hours of coursework or training in the identification and reporting of suspected child abuse or maltreatment in accordance with the requirements of section 3004 of the Education Law. In addition, the candidate who applies for the certificate on or after February 2, 2001, shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A

candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

5. Subparagraph (i) of paragraph (2) of subdivision (a) of section 80-5.22 of the Regulations of the Commissioner of Education is amended, effective July 23, 2013, as follows:

(i) Education. A candidate shall hold a graduate degree in science, technology, engineering or mathematics from a regionally or nationally accredited institution of higher education, a higher education institution that the commissioner deems substantially equivalent, or from an institution authorized by the Board of Regents to confer degrees. A candidate shall complete study in the means for identifying and reporting suspected child abuse and maltreatment, which shall include at least two clock hours of coursework or training in the identification and reporting of suspected child abuse or maltreatment in accordance with the requirements of section 3004 of the Education Law. In addition, the candidate shall complete at least two clock hours of coursework or training in school violence prevention and intervention, as required by section 3004 of the Education Law, which is provided by a provider approved or deemed approved by the department pursuant to Subpart 57-2 of this Title. A candidate who applies for the certificate on or after [July 1, 2013] *December 31, 2013*, shall also complete at least six clock hours, of which at least three hours must be conducted through face-to-face instruction, of coursework or training in harassment, bullying and discrimination prevention and intervention, as required by section 14 the Education Law.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire October 20, 2013.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, State Education Department, Office of Higher Education, State Education Building Annex, Room 979, 89 Washington Ave., Albany, NY 12234, (518) 486-3633, email: privers@mail.nysed.gov

Public comment will be received until: 45 days after publication of this notice.

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 14(5) requires the Commissioner of Education to prescribe regulations to require that school professionals applying on or after July 1, 2013 for a certificate or license, including but not limited to a certificate or license valid for service as a classroom teacher, school counselor, school psychologist, school social worker, school administrator or supervisor or superintendent of schools to complete training on the social patterns of harassment, bullying and discrimination. Chapter 90 of the Laws of 2013 amended Education Law section 14(5) to require such training for school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

Education Law section 207 grants general rule making authority to the Board of Regents to carry into effect the laws and policies of the State relating to education.

Education Law section 305(1) empowers the Commissioner of Education to be the chief executive officer of the state system of education and of the Board of Regents and authorizes the Commissioner to enforce laws relating to the educational system and to execute educational policies determined by the Regents. Section 305(2) authorizes the Commissioner to have general supervision over all schools subject to the Education Law.

Education Law section 3004(1) of the Education Law authorizes the Commissioner to prescribe, subject to the approval of the Regents, regulations governing the examination and certification of teachers employed in all public schools in the State.

Education Law section 3007 authorizes the Commissioner to endorse a diploma or certificate issued in another state.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the above statutory authority and is necessary to implement Education Law 14(5), as amended by Chapter 90 of the Laws of 2013, to require school professionals applying for a certificate or license on or after December 31, 2013 to complete training on the social patterns of harassment, bullying and discrimination.

3. NEEDS AND BENEFITS:

The Dignity for All Students Act (DASA) added Article 2 to the Education Law (Education Law §§ 10 through 18), to require, among other things, school districts to create policies and guidelines to be used in school training programs to discourage the development of discrimination or harassment and to enable employees to prevent and respond to discrimination or harassment. These provisions took effect on July 1, 2012.

Thereafter, in June 2012, the Legislature enacted Chapter 102 of the Laws of 2012, which amended the Dignity Act to include a requirement that school professionals applying for a certificate or license on or after July 1, 2013 complete training on the social patterns of harassment, bullying and discrimination.

In response to the new law, the Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLESN and Empire Pride Agenda to seek recommendations on how many hours and the types of training needed to ensure that school personnel have adequate training in harassment, bullying and discrimination. The work group recommended that the following actions be taken:

- Part 52 of the Commissioner's Regulations be amended to require teacher and school leadership preparation programs to include at least six hours of training in Harassment, Bullying and Discrimination Prevention and Intervention.
- A new Subpart 57-4 of the Commissioner's Regulations shall be added to establish standards under which the Department will approve providers of this training.
- Part 80 of the Commissioner's Regulations be amended to require that anyone applying for an administrative or supervisory service, classroom teaching service or school service certificate or license on or after July 1, 2013, shall have completed at least six clock hours of coursework or training in Harassment, Bullying and Discrimination Prevention and Intervention.

At its May meeting, the Board of Regents adopted regulations to implement the recommendations of the Work Group. However, since the Department was consulting with the Work Group for the last several months to develop a syllabus for the 6-hour training course and the syllabus and provider applications only became available in the last couple of months, there was not sufficient access to the training before the July 1 deadline. As a result, on June 30, 2013, the Governor signed Chapter 90 of the Laws of 2013, which amends Education Law section 14(5) to require such training for school professionals applying for a certificate or license on or after December 31, 2013, instead of July 1, 2013. The proposed amendment implements the new law, by making the training requirement applicable to school professionals applying for a certificate or license on or after December 31, 2013.

4. COSTS:

(a) Costs to State government: none.

(b) Costs to local governments: none.

(c) Cost to private regulated parties: none.

(d) Costs to regulating agency for implementing and continued administration of the rule: none.

The proposed amendment does not impose any costs on the State, local governments, private regulated parties or the State Education Department. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any additional program, service, duty or responsibility upon local governments. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

6. PAPERWORK:

The proposed amendment does not impose any new paperwork or record keeping requirements. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

7. DUPLICATION:

The amendment does not duplicate any existing State or Federal requirements, and is necessary to implement the Chapter 90 of the Laws of 2013.

8. ALTERNATIVES:

The proposed amendment is necessary to implement Chapter 90 of the

Laws of 2013, which amended Education Law section 14(5) to require training on the social patterns of harassment, bullying and discrimination for school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. The proposed amendment merely conforms the Commissioner's Regulations to the statute. There are no significant alternatives and none were considered.

9. FEDERAL STANDARDS:

There are no related Federal standards governing the certification of teachers and administrators.

10. COMPLIANCE SCHEDULE:

It is anticipated that regulated parties will be able to achieve compliance with this amendment by its stated effective date.

Regulatory Flexibility Analysis

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the proposed amendment that it does not affect small businesses or local governments, no affirmative steps are needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect school professionals in all parts of this State who are applying for a certificate or license on or after December 31, 2013, including those located in the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

2. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

The proposed amendment does not impose any compliance requirements or professional services requirements. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

3. COSTS:

The proposed amendment does not impose any costs. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs. The proposed amendment merely conforms the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. The statute which the proposed amendment implements applies to affected school professionals throughout the State, including those in rural areas. Therefore, it was not possible to establish different requirements for school professionals in rural areas, or to exempt them from the amendment's provisions.

5. RURAL AREA PARTICIPATION:

The Department consulted with a work group, which was comprised of representatives of teachers, administrators, school social workers, school counselors, school guidance counselors, school psychologists, superintendents, school boards, teacher education program faculty, GLSEN and Empire Pride Agenda. The work group included representatives from across the State, including members from rural areas.

6. INITIAL REVIEW OF RULE (SAPA § 207):

Pursuant to State Administrative Procedure Act section 207(1)(b), the State Education Department proposes that the initial review of this rule shall occur in the fifth calendar year after the year in which the rule is adopted, instead of in the third calendar year. The justification for a five year review period is that the proposed amendment merely implements, and conforms the Commissioner's Regulations to, statutory requirements under Chapter 90 of the Laws of 2013 and therefore the substantive provisions of the proposed amendment cannot be repealed or modified unless there is a further statutory change. Accordingly, there is no need for a shorter review period. The Department invites public comment on the proposed five year review period for this rule. Comments should be sent to the agency contact listed in item 10. of the Notice of Proposed Rule Making published herewith, and must be received within 45 days of the State Register publication date of the Notice.

Job Impact Statement

The proposed amendment is necessary to conform the Commissioner's Regulations to Education Law section 14(5), as amended by Chapter 90 of the Laws of 2013, by making the training requirement on the social patterns of harassment, bullying and discrimination applicable to school professionals applying for a certificate or license on or after December 31, 2013, instead of on or after July 1, 2013. The proposed amendment will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Moral Character Hearings Under 8 NYCRR Part 83 for Certified Teachers and Other Certified School Personnel

I.D. No. EDU-19-13-00006-ERP
Filing No. 774
Filing Date: 2013-07-22
Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action Taken: Amendment of sections 83.4 and 83.5 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(7), (30), 3001(2), 3001-d(2), 3004(1), 3004-c(not subdivided), 3006(1), 3009(1), 3010(not subdivided), 3035(1) and (3)

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: The Department's Office of School Personnel Review & Accountability (OSPRA) is responsible for facilitating fingerprint generated criminal background checks in accordance with the Education Law (Chapter 180 of the Laws of 2000). All prospective covered school employees and/or applicants for a teaching certificate must be fingerprinted.

Generally, fingerprints are collected across the state at school districts, Boards of Cooperative Educational Services (BOCES), colleges and universities, and law enforcement agencies. Fingerprints are received by the Department in two formats: hard cards containing fingerprints that are collected through the "ink and roll" method and mailed, and digital fingerprint images captured on a scanner and transmitted electronically via a server. All fingerprint images are delivered by the Department to the state Division of Criminal Justice Services (DCJS), which conducts a state criminal history records check and then forwards the images to the Federal Bureau of Investigation (FBI) for processing against their criminal record repository.

The Department has taken steps to better ensure the security of fingerprints in recent years by growing the number of fingerprints collected electronically. Approximately 75 percent of fingerprints are collected electronically, which reduces the opportunity for the integrity of fingerprints to be compromised.

In an effort to close potential gaps that may exist (such as the ability of a person to submit false fingerprints), the Department began a review of the fingerprinting process. As part of this review, the Department has determined that there are no provisions to expeditiously address actions related to fingerprint fraud. As such, individuals with serious criminal histories, whose presence in the classroom or school poses a danger to the safety of students and/or staff, may be able to evade the criminal history record check process and gain access to schools. The proposed amendment establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. In addition to shifting the burden to the teacher or school administrator in Part 83 proceedings, such

an amendment would serve as a deterrent for individuals who may be inclined to submit false information relative to a criminal history background check.

Based on public comment received following the 45-day public comment period required under the State Administrative Procedure Act, the proposed amendment was revised to clarify that the rebuttable presumption for fingerprinting fraud applies not only to crimes committed after certification, but also to convictions of individuals for submission of false fingerprints or other fraudulent acts undertaken to obtain their certification. In addition, the proposed amendment was revised to allow the Commissioner to initiate a review of the findings and recommendations of a hearing officer or hearing panel, including fingerprinting fraud.

Emergency action is needed for the preservation of the general welfare in order to ensure that action can be taken expeditiously to revoke or suspend the certificates of teachers and school administrators who commit a crime involving fraud or submission of information related to their criminal history record checks in order to ensure the safety of the children and faculty of the schools in this State.

Emergency action is also needed for the preservation of the general welfare in order to ensure that the proposed amendment continuously remains in effect until it can be adopted as a permanent rule. The proposed amendment was adopted as an emergency rule at the April 22-23, 2013 Regents meeting, effective April 23, 2013. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on May 8, 2013. Following the 45-day public comment period required under SAPA, the proposed rule was revised as described above. A Notice of Revised Rule Making will be published in the State Register on July 23, 2013. Following the public 30-day public comment period for a revised rule making, the proposed amendment will be adopted as a permanent rule. The earliest effective date of the revised rule, if adopted at the September meeting, would be October 2, 2013.

Emergency action is necessary for the preservation of the general welfare to revise the proposed amendment and ensure that the revised rule remains continuously in effect until the effective date of its permanent adoption.

Subject: Moral character hearings under 8 NYCRR Part 83 for certified teachers and other certified school personnel.

Purpose: To establish a rebuttable presumption that a certified individual who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character.

Text of emergency/revised rule: 1. Subdivision (d) of section 83.4 of the Regulations of the Commissioner of Education shall be amended, effective July 22, 2013, to read as follows:

(d) Evidence of conviction of a crime shall be admissible in any proceeding conducted pursuant to this Part, but such conviction shall not in and of itself create a conclusive presumption that the person so convicted lacks good moral character. *Except as otherwise provided in paragraph (4) of this subdivision,* [In] *in* the case of a certified individual, proof of conviction for any of the following acts constituting a crime in New York State and committed subsequent to certification shall create a rebuttable presumption that the individual so convicted lacks good moral character.

(1) . . .

(2) . . .

(3) . . .

(4) any crime committed involving the submission of false information, or the commission of fraud, related to a criminal history record check.

2. A new subparagraph (iv) shall be added to paragraph (1) of subdivision (b) of section 83.5 of the Regulations of the Commissioner of Education, effective July 22, 2013, to read as follows:

(iv) any crime committed involving the submission of false information, or the commission of fraud, related to a criminal history record check.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on May 8, 2013, I.D. No. EDU-19-13-00006-EP. The emergency rule will expire 60 days after filing.

Emergency rule compared with proposed rule: Substantial revisions were made in sections 83.4(d) and 83.5(b)(1).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, NYS Education Department, Office of Higher Education, Room 979, Washington Avenue, Albany, NY 12234, (518) 486-3633, email: privers@mail.nysed.gov

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 8, 2013, the proposed rule has been substantially revised as follows.

The introductory language of subdivision (d) of section 83.4 was revised in response to public comment to add the phrase ''Except as otherwise provided in paragraph (4) of this subdivision'' to clarify that the rebuttable ''lack of moral character'' presumption in section 83.4(d)(4) for proof of conviction of any crimes involving the submission of false information, or the commission of fraud, related to a criminal history check shall apply, not only to such crimes committed after certification, but also to such crimes that are committed to obtain certification.

In response to public comment, a new subdivision (iv) was added to section 83.5(b)(1) to authorize the Commissioner to initiate a review of the findings and recommendation of a hearing officer or hearing panel in cases involving convictions for any crimes involving the submission of false information, or the commission of fraud, related to a criminal history check.

The above revisions require that the Needs and Benefits, Local Government Mandates, and Compliance Requirements sections of the previously published Regulatory Impact Statement be revised to read as follows:

3. NEEDS AND BENEFITS:

The State Education Department's Office of School Personnel Review & Accountability (OSPRA) is responsible for facilitating fingerprint generated criminal background checks in accordance with the Education Law (Chapter 180 of the Laws of 2000). All prospective covered school employees and/or applicants for a teaching certificate must be fingerprinted.

Generally, fingerprints are collected across the state at school districts, Boards of Cooperative Educational Services (BOCES), colleges and universities, and law enforcement agencies. Fingerprints are received by the Department in two formats: hard cards containing fingerprints that are collected through the "ink and roll" method and mailed, and scanned fingerprint images captured on a scanner and transmitted electronically via a server. All fingerprint images are delivered by the Department to the state Division of Criminal Justice Services (DCJS) to conduct a state criminal history records check and to forward them to the Federal Bureau of Investigation (FBI) for processing against their criminal record repository.

The Department has taken steps to better ensure the security of fingerprints in recent years by growing the number of fingerprints collected electronically. Approximately 75 percent of fingerprints are collected electronically, which reduces the opportunity for the integrity of fingerprints to be compromised. However, the Department has begun to review the fingerprinting process to close potential gaps that may exist, such as the ability of a person to submit false fingerprints. As part of this review, the Department has determined that the proposed amendment is needed to expedite the removal of school district personnel that commit certain crimes. Currently, there are no provisions to expeditiously address actions related to fingerprint fraud, which can result in convicted felons whose presence in the classroom or school poses a danger to the safety of students and/or staff evading the criminal history record check process and gaining access to schools. The proposed amendment establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment also authorizes the Commissioner to initiate a review of the findings and recommendation of a hearing officer or hearing panel in cases involving convictions for any crimes involving the submission of false information, or the commission of fraud, related to a criminal history check. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty or responsibility upon local governments. The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a certified individual who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment also authorizes the Commissioner to initiate a review of the findings and recommendation of a hearing officer or hearing panel in cases involving convictions for any crimes involving the submission of false information, or the commission of fraud, related to a criminal history check. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

10. COMPLIANCE SCHEDULE:

The proposed amendment does not impose any costs or compliance requirements. The proposed amendment relates to evidentiary standards in hearings relating to the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a certified individual who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment also authorizes the Commissioner to initiate a review of the findings and recommendation of a hearing officer or hearing panel in cases involving convictions for any crimes involving the submission of false information, or the commission of fraud, related to a criminal history check. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 8, 2013, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith. The proposed amendment, as so revised, relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and will not impose any adverse economic, reporting, recordkeeping, or any other compliance requirements on small businesses or local governments. Because it is evident from the nature of the revised rule that it does not affect small businesses or local governments, no further steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 8, 2013, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The above changes require that the Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services and Minimizing Adverse Impact sections of the previously published Rural Area Flexibility Analysis be revised to read as follows:

2. REPORTING, RECORDKEEPING, AND OTHER COMPLIANCE REQUIREMENTS AND PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional reporting, recordkeeping, or other compliance requirements, or professional services requirements on any regulated party. The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment also authorizes the Commissioner to initiate a review of the findings and recommendation of a hearing officer or hearing panel in cases involving convictions for any crimes involving the submission of false information, or the commission of fraud, related to a criminal history check. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment does not impose any compliance requirements or costs on public or private entities located in rural areas. The proposed amendment relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and merely establishes a rebuttable presumption that a teacher or school administrator who is convicted of any crime relating to the submission of false information, or who has committed fraud, relating to his/her criminal history record check lacks good moral character. The proposed amendment also authorizes the Commissioner to initiate a review of the findings and recommendation of a hearing officer or hearing panel in cases involving convictions for any crimes involving the submission of false information, or the commission of fraud, related to a criminal history check. The proposed amendment will thereby expedite the removal of teachers and administrators that commit crimes involving the submission of false information, or the commission of fraud, related to a criminal history record check. Because evidentiary standards in Part 83 moral character hearings must be uniformly applicable throughout the State in order to meet Constitutional requirements, it is not possible to establish differing requirements for or to exempt affected individuals in rural areas.

Revised Job Impact Statement

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 8, 2013, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith. The proposed amendment, as so revised, relates to evidentiary standards in the conduct of moral character hearings for certified teachers and other certified school personnel under Part 83 of the Commissioner's Regulations, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed revised amendment that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on May 8, 2013, the State Education Department received the following comments:

1. One commenter notes that currently 8 NYCRR § 83.4(d) lists three categories of crimes that create a rebuttable presumption related to moral character: Penal Law drug offenses, physical or sexual abuse of a minor or student, and any crime committed on school property or while performing teaching duties. However, in all three cases the presumption is limited to only such crimes that are "committed subsequent to certification." It is not clear that this limitation should properly pertain to a conviction for fingerprinting fraud. Instead, it would seem appropriate to apply such a presumption not only to crimes committed after certification, but also to convictions of individuals for submission of false fingerprints or other fraudulent acts undertaken to obtain their certification.

DEPARTMENT RESPONSE:

The Department agrees and proposed amendment was revised to clarify that the presumption related to convictions for fingerprinting fraud also apply to the conviction of individuals for submission of false fingerprints or other fraudulent acts undertaken to obtain their certification.

2. COMMENT:

The commenter also notes that § 83.5(b) of the Commissioner's regulations provides that the Commissioner may initiate a review of the findings and recommendations of a hearing officer or hearing panel, but only in cases involving convictions of specific crimes – specifically, this provision relists the three categories of crimes in § 83.4(d). If SED believes that acts involving fingerprinting/criminal history fraud merit inclusion in the rebuttable presumption provisions in § 83.4(d), it may also find it appropriate to add such offenses to the list of crimes in § 83.5(b) that enable the Commissioner to initiate a review of a hearing report involving such cases.

DEPARTMENT RESPONSE:

The Department agrees and has revised § 83.5 of the Commissioner's regulations accordingly.

NOTICE OF ADOPTION

State Student Assessments in the Elementary and Secondary Grades

I.D. No. EDU-19-13-00005-A

Filing No. 777

Filing Date: 2013-07-23

Effective Date: 2013-08-07

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of Part 8 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101(not subdivided), 207(not subdivided), 208(not subdivided) and 209(not subdivided)

Subject: State student assessments in the elementary and secondary grades.

Purpose: To clarify procedures for establishment of cut scores and performance standards for determining proficiency on State Assessments.

Text or summary was published in the May 8, 2013 issue of the Register, I.D. No. EDU-19-13-00005-EP.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is the 4th or 5th year after the

year in which this rule is being adopted. This review period, justification for proposing same, and invitation for public comment thereon, were contained in a RFA, RAFA or JIS:

An assessment of public comment on the 4 or 5-year initial review period is not attached because no comments were received on the issue.

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Commercial and Recreational Regulations for Atlantic Menhaden

I.D. No. ENV-32-13-00004-EP

Filing No. 773

Filing Date: 2013-07-22

Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Proposed Action: Amendment of section 40.1(f); and addition of section 40.1(x) to Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-1303, 13-0105 and 13-0342

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: Adoption of these regulations on an emergency basis is necessary for New York to end overfishing on the Atlantic menhaden, be in compliance with the Fishery Management Plan (FMP) for Atlantic Menhaden as adopted by the Atlantic States Marine Fisheries Commission (ASMFC), and to avoid potential federal sanctions imposed for lack of compliance with the plan. Each member state of ASMFC is expected to promulgate regulations that comply with FMPs adopted by ASMFC. These regulations are needed to properly manage the State's fisheries. Because of the extended time needed to develop New York's fishery management proposal for menhaden and to allow the ASMFC Atlantic Menhaden Board to review the proposal, there was not enough time to promulgate this is as a normal rule making. This rule must be in effect as close to the ASMFC's compliance date of July 1, 2013 as possible. Therefore the rule is being submitted as an Emergency Rulemaking and Notice of Adoption.

Subject: Commercial and recreational regulations for Atlantic menhaden.

Purpose: Establish commercial quota management, reporting requirements and a recreational possession limit for Atlantic menhaden.

Text of emergency/proposed rule: Existing section 6 NYCRR 40.1 is amended to read as follows:

Existing subdivision 6 NYCRR 40.1(f) is amended to read as follows:

Species Striped bass through Oyster toadfish remain the same. Species Atlantic menhaden is added to read as follows:

40.1(f) Table A – Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Atlantic menhaden	*All year*	*No minimum size*	*100*

New subdivision 40.1(x) is adopted to read as follows:

(x) 'Atlantic menhaden commercial fishing - special regulations.'

(1) Permits. It is unlawful for any person to take or land menhaden for commercial purposes without having in possession a valid commercial food fishing license, commercial food fish landing license, a menhaden vessel license, or marine bait permit issued by the State of New York. For purposes of this subdivision, a person is presumed to be taking menhaden for commercial purposes when that person possesses more than 100 menhaden, or more than the possession limit for menhaden listed in Table A of this section, whichever is less. A person who holds a lobster bait gill net permit may take or land more than 100 menhaden; menhaden taken using this permit are for the sole use of the permittee to pursue the permittee's lobster fishery and may not be sold. A person who holds a lobster bait gill net permit must abide by the special regulations of this subdivision.

(2) Quota harvest and trip limits.

(i) The total annual harvest of menhaden may not exceed that amount annually allocated to New York State by the Atlantic States Marine Fisheries Commission (ASMFC) for the period January 1 through December 31. Annual harvest limits for menhaden are based on the Fishery Management Plan (FMP) for menhaden as adopted and approved by the ASMFC pursuant to the Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C., section 5101, 'et. seq.'

(ii) Following consultation with industry, the department may establish quota periods, trip limits and directed fishery thresholds such that the harvest does not exceed the quota assigned to New York.

(iii) When the department determines, based on a projection of landings using daily fishing vessel trip reports, that trip limits are necessary as provided in Table B of subdivision (i), such trip limits will be required and enforceable upon 72 hours written notice to license holders referenced in paragraph (1) of the appropriate limit allowed per vessel for that time period. Such trip limits may be further reduced by written direction of the department if the projection of the landings indicates a closure will be required before the end of the period. In any time period, the trip limits may be increased if the projection of the landings indicates the total quota will not be caught.

(3) Fishery closures.

(i) If the department determines that the maximum allowable harvest of menhaden will take place before the end of any period, the directed harvesting of menhaden for commercial purposes will be prohibited, except that the department may allow a bycatch of menhaden in non-directed fisheries, not to exceed 6,000 pounds daily per vessel trip. Directed harvest may be prohibited for all license holders, or for users of specific gear types as directed by the department upon 72 hours written notice to all license holders referenced in paragraph (1). If the department closes the period, but unanticipated events result in the quota not being landed by the projected date, then the department may reopen the period for a specified time and a specified trip limit upon 72 hours written notice to all license holders referenced in paragraph (1).

(4) Possession, transport and sale.

(i) During periods of trip limits, all menhaden must be held together in a separate container or containers readily available for inspection and may not be mixed with other species while on board any vessel.

(ii) During closed periods, no possession of menhaden shall be permitted on the waters of the marine and coastal district except as bycatch aboard vessels participating in other fisheries.

(5) Reporting requirements.

Any person who is the holder of a marine commercial food fishing license, commercial food fish landing license, a menhaden vessel license, marine bait permit, or lobster bait gill net permit issued by the State of New York shall report all harvest of menhaden in accordance with the requirements established in subdivision (c)(1) of this section.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire October 19, 2013.

Text of rule and any required statements and analyses may be obtained from: Kim McKown, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0454, email: kamckown@gw.dec.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) section 11-0303 authorizes the Department of Environmental Conservation (DEC) to adopt management regulations for fish resources. ECL section 11-1303 authorizes DEC to establish by regulation open seasons, size and catch limits and manner of taking of all species of fish in all waters of the state. ECL Section 13-0342 authorizes DEC to adopt regulations which require reporting of catch, effort, area fished, gear used, by-catch and volume and value of product purchased from permit holders of almost all categories of marine fish harvester and dealer licenses.

ECL Section 13-0105 requires that DEC be guided by the recommendations of the Marine Resources Advisory Council (MRAC) and to incorporate the Council's recommendation into the final rulemaking if they are found to be consistent with the state's marine fisheries conservation and management policies and interstate Fishery Management Plans (FMPs).

2. Legislative objectives:

It is the objective of the above-cited statutory provisions that DEC manages marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies, and interstate FMPs. Further it is the intent of the statute that DEC incorporates the recommendation of the MRAC if the recommendations do not conflict with state policy or interstate FMPs.

3. Needs and benefits:

This rule making is necessary to reduce menhaden harvest by 20 percent to end overfishing. The Atlantic Menhaden Management Board adopted new reference points in response to the 2010 Peer Review Panel's recommendation to provide greater protection for the stock. The 2012 stock assessment update found overfishing to be occurring on the Atlantic menhaden stock. Amendment 2 to the Atlantic States Marine Fisheries Commission (ASMFC) Atlantic Menhaden FMP implements a total allowable catch (TAC) in 2013 to end overfishing. The TAC is a 20 percent reduction from the 2009 through 2011 average landings and approximately 25 percent reduction from 2011.

Because of the extended time needed to develop New York's fishery management proposal for menhaden and to allow the ASMFC Atlantic Menhaden Board to review the proposal, there was not enough time to promulgate this is as a normal rule making. This rule must be in effect as close as possible to the ASMFC's compliance date of July 1, 2013. Therefore the rule is being submitted as an emergency adoption (with an accompanying notice of proposed rule making). Failure to adopt the rule in a timely fashion may result in a menhaden fishery closure due to noncompliance. The commercial and recreational menhaden fisheries in New York could be penalized and closed until the State comes back into compliance. This would cause significant hardship on resource users. The estimated dollar value of New York's commercial menhaden harvest was approximately $270,000 in 2011 based on our best estimate of landings. Menhaden is used as bait in New York's trap fisheries and by recreational anglers. Since menhaden is used as bait to catch other fish, the loss of this resource would have much higher economic impact.

4. Costs:

(a) Cost to State government:

The cost to state government is primarily that affecting the regulating agency, the Department of Environmental Conservation, and is described under section (d).

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

The proposed rule will impose costs to commercial menhaden harvesters and potentially to recreational anglers who use menhaden as bait. The objective of Amendment 2 is to decrease harvest by 20 percent based on historic landings information. If New York must abide by the quota specified in Amendment 2, the impact to permit holders will be much greater than the 20 percent reduction, since we believe the historic harvest may have been an order of magnitude greater than New York's ASMFC quota allocation.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

DEC will incur costs associated with both the implementation and administration of these rules, including the costs relating to notifying permit holders of the new rules, the workload and mailing costs associated with quota management and the costs of increased enforcement.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

Food fishing, menhaden vessel, marine bait and lobster bait gillnet permit holders are required to report their menhaden harvesting activities in accordance with state reporting regulations. Food fish, marine bait and lobster bait gillnet permit holders are required by 6 NYCRR section 40.1(c) to report all species caught. The proposed rule specifies that menhaden catch must be reported.

7. Duplication:

The proposed amendment does not duplicate any State or Federal requirement.

8. Alternatives:

Alternative Measures: Amendment 2 to the ASMFC Atlantic Menhaden FMP adopted a TAC which was a 20 percent reduction of the average harvest from 2009 through 2011 to end overfishing. Alternative measures would need to be approved by the ASMFC Menhaden Management Board.

"Landings reconstruction": DEC requested a grace period to give staff time to reconstruct New York's historic (2009 through 2011) menhaden landings. This would allow New York to establish a more realistic quota based on information submitted on harvest reports that have not yet been compiled and processed and from previously unreported landings submitted by harvesters which have been verified. The ASMFC Menhaden Management Board was not clear about the status of this grace period, but still required DEC to implement quota management in 2013. DEC intends to continue to work on reconstructing the 2009 through 2012 menhaden landings data in order to attempt to revise our ASMFC quota allocation in the future.

No action: This alternative is rejected because New York State must abide by the ASMFC Atlantic Menhaden FMP required quota management plan to end overfishing on the stock.

9. Federal standards:

The revisions to Section 40.1 are in compliance with the ASMFC fishery management plan for Atlantic menhaden.

10. Compliance schedule:

The ASMFC implementation deadline for menhaden management was July 1, 2013. DEC seeks to adopt this rule making as quickly as possible. Regulated parties will be notified of the changes to the regulations by mail, through appropriate news releases and via DEC's website and electronic mailing list.

Regulatory Flexibility Analysis

1. Effect of rule:

The amendment of 6 NYCRR Section 40.1 establishes Atlantic menhaden commercial quota management, reporting requirements and a recreational possession limit. The rule will affect both commercial and recreational menhaden harvesters. Small businesses directly affected by the quota include licensed commercial food fish, menhaden vessel and marine bait harvesters. There were 1,108 food fishing, 23 menhaden vessel and 80 marine bait permit holders during 2012. Most commercial harvesters holding food fishing and marine bait permits are self-employed. Commercial harvesters who utilize menhaden for bait (such as lobster and crab permit holders) and recreational anglers may be impacted by these rules due to possible bait shortages or price increases. Recreational harvesters may also be impacted by the possession limit for recreational harvest. In addition, although most permit reporting requirements specify that "all species" caught must be reported, many permit holders did not realize that menhaden needed to be reported since it is used as bait. The proposed regulation specifies that menhaden must be reported on trip reports. The regulations do not apply directly to local governments, and will not have any direct effects on local governments.

The objective of Amendment 2 to the Atlantic States Marine Fisheries Commissions (ASMFC) Atlantic Menhaden Fishery Management Plan (FMP) is to reduce harvest of menhaden by 20 percent to end overfishing. Amendment 2 implements a total allowable catch (TAC) in 2013 to end overfishing. The TAC is a 20 percent reduction from the 2009 through 2011 average landings and approximately 25 percent reduction from 2011.

The proposed rule will impose costs to commercial menhaden harvesters and recreational anglers. The objective of Amendment 2 is to decrease harvest by 20 percent based on historic landings information. If New York must abide by the quota specified in Amendment 2, the impact to permit holders will be much greater than the 20 percent reduction, since we believe the historic harvest was approximately an order of magnitude greater than New York's ASMFC quota allocation. The estimated dollar value of New York's commercial menhaden harvest was approximately $270,000 in 2011 based on estimated landings. Menhaden is used as bait in New York's trap fisheries and by recreational anglers. Since menhaden is used as bait to catch other fish, the loss of this resource would have much higher economic impact.

In the long-term, the maintenance of sustainable fisheries will have a positive effect on small businesses in the fisheries in question. Any short-term losses in participation, harvest and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Menhaden are an important prey species for many marine species. Protection of the menhaden resource is essential to the survival of these predator species and the commercial and recreational fisheries that rely on the health and sustainability of both menhaden and many of the species that feed on them. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest, and to continue to rebuild or maintain the stocks for future utilization.

2. Compliance requirements:

New York must implement a quota management system by July 1, 2013 and manage the fishery under a quota which is much lower than the estimated landings of previous years. Recreational anglers that catch menhaden for their own bait will need to comply with a possession limit. In addition, food fishing, menhaden vessel, marine bait and lobster bait gillnet permit holders are required to report their menhaden harvesting activities in accordance with the state reporting requirements. Food fishing, marine bait and lobster bait gillnet permits are already required to report "all species" caught. This rule specifies that menhaden catch must be reported as well.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated

business or industry to comply with the proposed rule. Commercial menhaden harvesters' costs involve the loss of harvest due to the quota which reduces harvest by 20 percent based on 2009 – 2011 reported landings, which may be as much as an order of magnitude below New York's actual landings during that time period. Bait dealers and recreational anglers may incur costs due to decreased availability of menhaden for sale and possible increased costs for those menhaden that are available.

5. Economic and technological feasibility:

The proposed regulations do not require any expenditure on the part of affected businesses in order to comply with the changes. The changes required by this proposed rule may economically impact some commercial menhaden harvesters and bait dealers as detailed above.

There is no additional technology required for small businesses, and this action does not apply to local governments. Therefore, there are no technological impacts for any such bodies.

6. Minimizing adverse impact:

The unavoidable short term impact of these regulations will be an immediate reduction in the amount of menhaden that can be landed by commercial fishermen and recreational harvesters. Due to the fact that New York's historic menhaden harvest was under-reported, DEC submitted a proposal to the ASMFC Atlantic Menhaden Management Board requesting a grace period for more time to reconstruct New York's historic (2009 through 2011) menhaden landings. This would allow New York to establish a more realistic quota based on information from reports that have not been compiled and processed and from previously unreported landings. The ASMFC Menhaden Management Board was not clear about the status of this grace period, but still required DEC to implement quota management in 2013. DEC intends to continue to work on reconstructing the 2009 through 2012 menhaden landings data in order to attempt to revise the ASMFC quota allocation for New York in the future.

The promulgation of this regulation is necessary for DEC to become in compliance with the Atlantic menhaden FMP. The regulations are intended to protect the menhaden resource and avoid adverse impacts that would be associated with closure of the fishery for non-compliance with the FMP.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to comply with an FMP and take required actions to protect a marine fishery could have an adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being adopted in order to end overfishing while allowing for some harvest.

7. Small business and local government participation:

ASMFC scheduled a public meeting on draft Amendment 2 for November 1, 2012. This meeting had to be canceled due to the impact of Super Storm Sandy on the region. ASMFC was unable to reschedule the meeting, but the draft Amendment was available on the ASMFC web site and there was an opportunity for harvesters to submit written comments.

DEC alerted the Marine Resources Advisory Council (MRAC) about New York's Menhaden Fishery Management proposal for implementation of Amendment 2 at the May 2013 meeting. No formal discussion or vote was taken on the proposal. The same evening DEC held an informational meeting for permit holders to discuss the same information. We received feedback from permit holders that the reported landings that ASMFC was basing New York's commercial menhaden quota on were unrealistically low. Many permit holders mentioned they didn't realize they needed to report, and offered to help DEC to reconstruct the historic landings.

There was no special effort to contact local governments because the proposed rule does not affect them.

8. For rules that either establish or modify a violation or penalties associated with a violation:

Pursuant to SAPA 202-b (1-a)(b), no cure period is included in the rule because of the potential adverse impact on the resource. Cure periods for the illegal taking of fish or wildlife are neither desirable nor recommended. Immediate compliance is required to ensure the general welfare of the public and the resource is protected.

9. Initial review of the rule, pursuant to SAPA section 207 as amended by L. 2012, ch. 462:

DEC will conduct an initial review of the rule within three years as required by SAPA section 207.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The proposed rule will affect commercial and recreational fishermen who harvest Atlantic menhaden from marine and estuarine waters in New York. The majority of these individuals are residents of the New York City and Long Island metropolitan areas. In 2012 over 98 percent of the 1,144 permit holders affected by the proposed rule lived in urban counties while only 2 percent lived in rural counties.

2. Reporting, recordkeeping and other compliance requirements; and professional services:

Food fishing, menhaden vessel, marine bait, and lobster bait gillnet permit holders are required to report their menhaden harvesting activities in accordance with state reporting regulations. Food fishing, marine bait, and lobster bait gillnet permit holders are already required to report all species caught; this rule just specifies that menhaden catch must also be reported.

3. Costs:

The proposed rule will impose costs to commercial menhaden harvesters and potentially to recreational anglers who use menhaden as bait. The objective of the Amendment 2 is to decrease harvest by 20 percent based on historic landings information. If New York must abide by the quota specified in Amendment 2, the impact to permit holders will be much greater than 20 percent reduction, since we believe the historic harvest may have been an order of magnitude greater then ASMFC's quota allocation. The majority of these costs will impact urban areas since 98 percent of the permit holders come from urban counties.

4. Minimizing adverse impact:

The unavoidable short term impact of these regulations will be an immediate reduction in the amount of menhaden that can be landed by commercial fishermen and recreational harvesters. Due to the fact that New York's historic menhaden harvest was under-reported, DEC submitted a proposal to the ASMFC Atlantic Menhaden Management Board requesting a grace period for more time to reconstruct New York's historic (2009 through 2011) menhaden landings. This would allow New York to establish a more realistic quota based on information from harvest reports that have not been compiled and processed and from previously unreported landings submitted by harvesters. The ASMFC Menhaden Management Board was not clear about the status of this grace period, but still required DEC to implement quota management in 2013. DEC intends to continue to work on reconstructing the 2009 through 2012 menhaden landings data in order to attempt to revise our ASMFC quota allocation in the future.

The promulgation of this regulation is necessary for DEC to become in compliance with the Atlantic menhaden FMP. The regulations are intended to protect the menhaden resource and avoid adverse impacts that would be associated with closure of the fishery for non-compliance with the FMP.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to comply with an FMP and take required actions to protect a marine fishery could have an adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being adopted in order to end overfishing while allowing for some harvest.

5. Rural area participation:

The majority of menhaden harvesters are residents of the New York City and Long Island metropolitan areas. In 2012 over 98 percent of the 1,144 permit holders affected by the proposed rule lived in urban counties while only 2 percent lived in rural counties.

ASMFC scheduled a public meeting on Long Island on draft Amendment 2 for November 1, 2012. This meeting had to be canceled due to the impact of Super Storm Sandy on the region. ASMFC was unable to reschedule the meeting, but the draft Amendment was available on the ASMFC web site and there was an opportunity for harvesters to submit written comments. New York's Menhaden Fishery Management proposal was discussed at the Marine Resources Advisory Council meeting and a menhaden public information meeting in May 2013 on Long Island.

DEC staff focused public outreach in the marine and coastal district because that is where the majority of the menhaden are harvested.

6. Initial review of the rule, pursuant to SAPA section207 as amended by L. 2012, ch. 462:

The department will conduct an initial review of the rule within three years as required by SAPA section 207.

Job Impact Statement

1. Nature of impact:

The amendment of 6 NYCRR Section 40.1 establishes Atlantic menhaden commercial quota management, reporting requirements and a recreational possession limit. The rule will affect both commercial and recreational menhaden harvesters. This rule making is necessary to implement Amendment 2 of the Atlantic States Marine Fisheries Commission (ASMFC) Atlantic menhaden Fishery Management Plan (FMP). Failure by New York to adopt this measure could result in a determination of noncompliance by ASMFC and the Secretary of Commerce and the imposition of a fishery closure. The objective of this Amendment 2 is to reduce the menhaden harvest by 20 percent to end overfishing. New York must abide by the quota specified in Amendment 2, however DEC believes the impact to license holders will be greater than the 20 percent reduction, since there are strong indicators that the historic harvest was approximately an order of magnitude greater than New York's ASMFC quota allocation.

2. Categories and numbers affected:

The rule will affect both commercial and recreational menhaden harvesters. Small businesses directly affected by the quota include licensed commercial food fish, menhaden vessel and marine bait harvesters. There were 1,108 food fishing, 3 menhaden vessel, and 80 marine bait permit holders during 2012. Most commercial harvesters holding food fish and marine bait permits are self-employed. An unknown number of other commercial harvesters that rely on menhaden for bait (such as lobster and crab permit holders) and recreational anglers may be impacted by these rules due to possible bait shortages or price increases. Recreational harvesters may also be impacted by the possession limit for recreational harvest.

3. Regions of adverse impact:

In 2012 almost 93 percent of the license holders affected by the proposed rule lived in The New York City and Long Island metropolitan areas counties while less than 7 percent lived in other areas within and outside of New York.

4. Minimizing adverse impact:

The unavoidable short-term impact of these regulations will be an immediate reduction in the amount of menhaden that can be landed by commercial fishermen and recreational harvesters. Due to the fact that New York's historic menhaden harvest was under-reported, DEC submitted a proposal to the ASMFC Atlantic Menhaden Management Board requesting a grace period for more time to reconstruct New York's historic (2009 through 2011) menhaden landings. This would allow New York to establish a more realistic quota based on information submitted on harvest reports that have not been computerized and from previously unreported landings submitted by harvesters which have been verified. The ASMFC Menhaden Management Board was not clear about the status of this grace period, but still required DEC to implement quota management in 2013. DEC intends to continue to work on reconstructing the 2009 through 2012 menhaden landings data in order to attempt to revise our ASMFC quota allocation in the future.

The promulgation of this regulation is necessary for DEC to become in compliance with the Atlantic menhaden FMP. The regulations are intended to protect the menhaden resource and avoid adverse impacts that would be associated with closure of the fishery for non-compliance with the FMP.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to comply with an FMP and take required actions to protect a marine fishery could have an adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being adopted in order to end overfishing while allowing for some harvest.

5. Self-employment opportunities:

The commercial menhaden industry as a whole is self-employed, as are portions of the recreational industry.

6. Initial review of the rule, pursuant to SAPA section 207 as amended by L. 2012, ch. 462:

DEC will conduct an initial review of the rule within three years as required by SAPA section 207.

NOTICE OF ADOPTION

Exception for the Possession and Sale of Bighead Carp

I.D. No. ENV-10-13-00007-A
Filing No. 772
Filing Date: 2013-07-22
Effective Date: 2013-08-07

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 180.9 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, 11-0507 and 11-0511

Subject: Exception for the Possession and Sale of Bighead Carp.

Purpose: Repeal the current exception for the sale of bighead carp.

Text or summary was published in the March 6, 2013 issue of the Register, I.D. No. ENV-10-13-00007-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Shaun Keeler, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8928, email: sxkeeler@gw.dec.state.ny.us

Revised Regulatory Impact Statement

A revised Regulatory Impact Statement (RIS) is not included as there are no revisions to the previously published RIS as contained in the Notice of Proposed Rule Making (NPR).

Revised Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A RAFA, RFA and JIS were not required for the NPR and the NPR included statements stating why. Therefore the statements are not being included as part of the NOA.

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2018, which is no later than the 5th year after the year in which this rule is being adopted

Assessment of Public Comment

Comments were received from a total of approximately 20 people/organizations. The majority of those received were from individuals with a few from organizations (both private and public entities). Comment received was unanimously in support of the proposal to eliminate the current exception that allows for the possession and sale of bighead carp. No comment was received in opposition of the proposal.

Department of Financial Services

NOTICE OF EMERGENCY ADOPTION AND REVISED RULE MAKING NO HEARING(S) SCHEDULED

Unauthorized Providers of Health Services

I.D. No. DFS-11-13-00008-ERP
Filing No. 776
Filing Date: 2013-07-22
Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action Taken: Amendment of Part 65 of Title 11 NYCRR.

Statutory authority: Financial Services Law, section 202 and arts. 3 and 4; Insurance Law, sections 301, 5109, and 5221 and arts. 4 and 51

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: This regulation concerns the de-authorization of certain providers of health services. Insurance Law § 5109(a) requires the Superintendent, in consultation with the Commissioner of Health and the Commissioner of Education, to promulgate standards and procedures for investigating and suspending or removing the authorization for providers of health services to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to Insurance Law § 5109.

For years, certain owners and operators of professional service corporations and other types of corporations have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile premiums, and schemes such as the fraudulent staging of auto accidents endangers the innocent public. Furthermore, it places in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage in such activities from demanding or requesting payment from no-fault insurers.

For the reasons stated above, emergency action is necessary for the public health, public safety, and general welfare.

Subject: Unauthorized Providers of Health Services.

Purpose: Establish standards and procedures for the investigation and suspension or removal of a health service provider's authorization.

Text of emergency/revised rule: *Section 65-5.0 Preamble.*

(a) For years, certain owners and operators of professional service corporations or other similar business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. This fraud costs no-fault insurers tens if not hundreds of millions of dollars, which insurers ultimately pass on to New York consumers in the form of higher automobile insurance premiums. It also threatens the affordability of health care and the public's health, safety, and welfare.

(b) Insurance Law section 5109 requires the Superintendent of Financial Services, in consultation with the Commissioner of Health and the Commissioner of Education, to establish standards and procedures for the investigation and suspension or removal of a provider of health services' authorization to demand or request payment for health services provided under Insurance Law article 51. This Subpart implements Insurance Law section 5109.

Section 65-5.1 Definitions.

As used in this Subpart, the following terms shall have the meaning ascribed to them:

(a) "Health services" or "medical services" means services, supplies, therapies, or other treatments as specified in Insurance Law section 5102(a)(1)(i), (ii), or (iv).

(b) "Insurer" shall have the meaning set forth in Insurance Law section 5102(g), and also shall include the motor vehicle accident indemnification corporation and any company or corporation providing coverage for basic economic loss, as defined in Insurance Law section 5102(a), pursuant to Insurance Law section 5103(g).

(c) "Noticing commissioner" means the Commissioner of Health or the Commissioner of Education, whomever sends a notice of hearing under this Subpart.

(d) "Provider of health services" or "provider" means a person or entity who or that renders or has rendered health services.

(e) "Superintendent" means the Superintendent of Financial Services.

Section 65-5.2 Investigations.

(a) The superintendent may investigate any reports made pursuant to Insurance Law section 405, allegations, or other information in the superintendent's possession, regarding providers of health services engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). After conducting an investigation, the superintendent will send to the Commissioner of Health or the Commissioner of Education, as appropriate, a list of any providers who or that the superintendent believes may have engaged in any of the unlawful activities set forth in Insurance Law section 5109(b), together with a description of the grounds for inclusion on the list. Within 45 days of receipt of the list, the Commissioner of Health or Commissioner of Education shall notify the superintendent in writing whether he or she confirms that the superintendent has a reasonable basis to proceed with notice and a hearing for determining whether any of the listed providers should be deauthorized from demanding or requesting any payment for medical services in connection with any claim under Insurance Law article 51.

(b) The Commissioner of Health and the Commissioner of Education also may investigate any reports, allegations, or other information in their possession, regarding providers engaging in any of the unlawful activities set forth in Insurance Law section 5109(b). If either commissioner conducts an investigation, then that commissioner, or the superintendent, if requested by the commissioner, shall be responsible for providing notice and an opportunity to be heard to the providers of health services that they are subject to deauthorization from demanding or requesting any payment for medical services in connection with any claim under Insurance Law article 51. Nothing in this section, however, shall preclude the superintendent, Commissioner of Health, or Commissioner of Education from conducting joint investigations and hearings, or the Commissioner of Health or Commissioner of Education from conducting professional misconduct proceedings against the providers of health services pursuant to the Public Health Law or Title VIII of the Education Law.

Section 65-5.3 Notice; how given.

(a)(1) The superintendent, Commissioner of Health, or Commissioner of Education shall give notice of any hearing to a provider at least 30 days prior to the hearing, in writing, either by delivering it to the provider or by depositing the same in the United States mail, postage prepaid, registered or certified, and addressed to the last known place of business of the provider or if no such address is known, then to the residence address of the provider.

(2) The notice shall refer to the applicable provisions of the law under which action is proposed to be taken and the grounds therefor, but failure to make such reference shall not render the notice ineffective if the provider to whom it is addressed is thereby or otherwise reasonably apprised of such grounds.

(3) It shall be sufficient for the superintendent or noticing commissioner to give to the provider:

(i) notice of the time and the place at which an opportunity for hearing will be afforded; and

(ii) if the person appears at the time and place specified in the notice or any adjourned date, a hearing.

(b) At least ten days prior to the hearing date fixed in the notice, the provider may file an answer to any charges with the superintendent or noticing commissioner.

(c) Any hearing of which such notice is given may be adjourned from time to time without other notice than the announcement thereof at such hearing.

(d) The statement of any regular salaried employee of the Department of Financial Services, Department of Health, or Department of Education, subscribed and affirmed by such employee as true under the penalties of perjury, stating facts that show that any notice referred to in this section has been delivered or mailed as hereinbefore provided, shall be presumptive evidence that such notice has been duly delivered or mailed, as the case may be.

Section 65-5.4 Hearings.

(a) Unless otherwise provided, any hearing may be held before the superintendent, Commissioner of Health or Commissioner of Education, any deputy, or any designated salaried employee of the Department of Financial Services, Department of Health, or Department of Education who is authorized by the superintendent or noticing commissioner for such purpose. The hearing shall be noticed, conducted, and administered in compliance with the State Administrative Procedure Act.

(b) The person conducting the hearing shall have the power to administer oaths, examine and cross-examine witnesses, and receive documentary evidence, and shall report his or her findings, in writing, to the superintendent or noticing commissioner with a recommendation. The report, if adopted by the superintendent or noticing commissioner, may be the basis of any determination made by the superintendent or noticing commissioner.

(c) Every such hearing shall be open to the public unless the superintendent or noticing commissioner, or the person authorized by the superintendent or noticing commissioner to conduct such hearing, shall determine that a private hearing would be in the public interest, in which case the hearing shall be private.

(d) Every provider affected shall be permitted to: be present during the giving of all the testimony; be represented by counsel; have a reasonable opportunity to inspect all adverse documentary proof; examine and cross-examine witnesses; and present proof in support of the provider's interest. A stenographic record of the hearing shall be made, and the witnesses shall testify under oath.

(e) Nothing herein contained shall require the observance at any such hearing of formal rules of pleading or evidence.

Section 65-5.5 Report of hearing and findings.

(a) Pending a final determination by the superintendent, Commissioner of Health, or Commissioner of Education, if the superintendent or noticing commissioner believes that the provider has engaged in any activity set forth in Insurance Law section 5109(b), then the superintendent or noticing commissioner may temporarily prohibit the provider from demanding or requesting any payment for medical services under Insurance Law article 51 for up to 90 days from the date of the notice of such temporary prohibition pursuant to Insurance Law section 5109(e).

(b) The hearing officer shall issue to the superintendent or noticing commissioner the report described in Section 65-5.4(b) of this Subpart, with a recommendation. The superintendent or noticing commissioner may adopt, modify, remand, or reject the hearing officer's report and recommendation.

(c)(1) Upon consideration of the hearing officer's report and recommendation, the superintendent or noticing commissioner may issue a final order prohibiting the provider from demanding or requesting any payment for medical services in connection with any claim under Insurance Law article 51 and requiring the provider to refrain from subsequently treating, for remuneration, as a private patient, any person seeking medical treatment under Insurance Law article 51, for a period specified by the superintendent or noticing commissioner.

(2) If the superintendent or noticing commissioner issues a final order prohibiting the provider from demanding or requesting any payment for medical services in connection with any claim under Insurance Law article 51 and requiring the provider to refrain from subsequently treating, for remuneration, as a private patient, any person seeking medical treatment under Insurance Law article 51, for a period longer than three years, then the provider may, after the expiration of three years, submit a written application to the superintendent or noticing commissioner requesting that the superintendent or noticing commissioner reconsider his or her order. The written application shall explain why revising the order would not jeopardize the health, safety, and welfare of the people of this State.

This notice is intended to serve as both a notice of emergency adoption

and a notice of revised rule making. The notice of proposed rule making was published in the *State Register* on March 13, 2013, I.D. No. DFS-11-13-00008-EP. The emergency rule will expire September 19, 2013.

Emergency rule compared with proposed rule: Substantial revisions were made in sections 65-5.0(b), 65-5.1(d), 65-5.2 and 65-5.5(a), (c).

Text of rule and any required statements and analyses may be obtained from: Camielle A. Barclay, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 480-5299, email: camielle.barclay@dfs.ny.gov

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 30 days after publication of this notice.

Revised Regulatory Impact Statement

1. Statutory authority: Section 202 and Articles 3 and 4 of the Financial Services Law, and Sections 301, 5109, and 5221 and Articles 4 and 51 of the Insurance Law. Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law. Article 3 of the Financial Services Law sets forth administrative and procedural provisions, while Article 4 of the Financial Services Law confers certain powers and duties on the Superintendent with regard to financial frauds prevention. Insurance Law § 5109 requires the Superintendent to promulgate standards and procedures for investigating and suspending or removing, after notice and a hearing, the authorization of health service providers to bill no-fault insurance if they engage in certain unlawful conduct. Insurance Law § 5221 specifies the duties and obligations of the Motor Vehicle Accident Indemnification Corporation ("MVAIC") with regard to the payment of no-fault benefits to qualified persons. In addition, Article 4 of the Insurance Law sets forth requirements for reporting and preventing fraud, while Article 51 of the Insurance Law governs the no-fault insurance system.

2. Legislative objectives: Insurance Law § 5109 requires the Superintendent, in consultation with the Commissioner of Health and the Commissioner of Education, to promulgate standards and procedures for investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109. Furthermore, Insurance Law § 301 and Financial Services Law §§ 202 and 302 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law and to effectuate any power granted to the Superintendent under the Insurance Law.

3. Needs and benefits: For years, certain owners and operators of professional service corporations and other business entities have abused the no-fault insurance system. These persons are involved in activities that include intentionally staging accidents and billing no-fault insurers for health services that were unnecessary or never in fact rendered. Indeed, recent federal indictments have demonstrated that organized crime has infiltrated and permeated the no-fault provider network. Such wide-scale criminal activity is estimated to have defrauded insurers of at least hundreds of millions of dollars, if not more. Insurers ultimately pass on these costs to New York consumers in the form of higher automobile insurance premiums, and schemes such as the fraudulent staging of auto accidents endanger the innocent public. Furthermore, these activities place in peril the quality of care received by innocent auto accident victims and the public's health, safety, and welfare.

It is of the utmost importance that the Superintendent, Commissioner of Health, and Commissioner of Education be able, as soon as possible, to prohibit health service providers who engage in such activities from demanding or requesting payment from no-fault insurers.

Therefore, after consultation with the Commissioner of Health and the Commissioner of Education, the Superintendent drafted this rule to promulgate standards and procedures for investigating and suspending or removing the authorization for health service providers to demand or request payment for health services under Article 51 of the Insurance Law upon findings of certain unlawful conduct reached after investigation, notice, and a hearing pursuant to § 5109.

4. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

5. Local government mandates: This rule does not impose any requirement upon a city, town, village, school district, or fire district.

6. Paperwork: This rule does not impose any additional paperwork.

7. Duplication: This rule will not duplicate any existing state or federal rule.

8. Alternatives: The earlier, emergency version of this rule did not indicate whether the Superintendent or noticing commissioner may prohibit a person from billing no-fault insurers for a specified period of time rather than permanently. However, there may be circumstances where it is appropriate for the Superintendent or noticing commissioner to impose the prohibition for only a limited period of time or to entertain applications to lift the prohibition after a certain number of years.

Therefore, the rule makes clear that the Superintendent or noticing commissioner may prohibit a person from billing no-fault insurers for a period determined by the Superintendent. Under this language, if the Superintendent or noticing commissioner has prohibited a provider from billing no-fault insurers for more than three years, then the provider may, after the expiration of three years, submit a written application to the Superintendent or noticing commissioner requesting that he or she reconsider his or her order. The written application must explain why revising the order would not jeopardize the health, safety, and welfare of the people of New York State.

9. Federal standards: There are no minimum standards of the federal government for the same or similar subject areas. The rule is consistent with federal standards or requirements.

10. Compliance schedule: Insurance Law § 5109(a) requires notice to all health service providers of the provisions of § 5109 and this rule at least 90 days in advance of the effective date of the rule. This rule was promulgated on an emergency basis on March 9, 2012 (to take effect 95 days after filing with the Secretary of State, i.e., June 12, 2012), June 6, 2012 (to take effect on June 12, 2012), August 31, 2012, November 28, 2012, and February 25, 2013. Notice of the proposed rule was published in the State Register on March 13, 2013. The rule was re-promulgated on an emergency basis on May 24, 2013.

The Department provided the required notice by, among other things, emailing notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; posting a copy of the rule on its website continually since March 9, 2012; and publishing the rule in the State Register.

Revised Regulatory Flexibility Analysis

1. Effect of the rule: The Department of Financial Services ("Department") finds that this rule will generally not impose reporting, recordkeeping or other requirements on small businesses or local governments. The basis for this finding is that this rule does not impose any substantive requirements on small businesses or local governments. In addition, this rule affects no-fault insurers authorized to do business in New York State and self-insurers, none of which fall within the definition of "small business" because none are both independently owned and have less than one hundred employees. Self-insurers are typically large enough to have the financial ability to self-insure losses and the Department does not have any information to indicate that any self-insurers are small businesses.

This rule also affects health service providers, some of whom may be considered small businesses. However, this rule does not impose any substantive requirements on health service providers.

Some local governments self-insure their no-fault benefits. The Department has not been able to determine the number of local governments that are self-insured. However, this rule does not impose any substantive requirements on local governments, and any impact on local governments would be positive and should reduce their costs.

2. Compliance requirements: This rule does not impose any additional paperwork.

3. Professional services: This rule does not require anyone to use professional services. However, if a health service provider is subject to a hearing, the provider may be represented by counsel.

4. Compliance costs: This rule does not impose compliance costs on small businesses or local governments, because it does not impose any substantive requirements. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers.

5. Economic and technological feasibility: This rule does not impose any substantive requirements on small businesses or local governments, so there should not be any issues pertaining to economic and technological feasibility.

6. Minimizing adverse impact: This rule affects uniformly health service providers and no-fault insurers in all parts of New York State and the rule is mandated by statute. The Department does not believe that it will have an adverse impact.

7. Small business and local government participation: The Department issued a press release regarding the rule on March 8, 2012; emailed notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; has posted a copy of the rule on its website since March 9, 2012; and published the rule in the State Register. In addition, interested parties were given an opportunity to comment on the proposed regulation that was published in the State Register on March 13, 2013.

Revised Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: Health service providers, insurers, and self-insurers affected by this regulation do business in every county in this state, including rural areas as defined under Section 102(10) of the State Administrative Procedure Act. Some of the home offices of these health service providers, insurers, and self-insurers lie within rural areas. Some government entities that are self-insurers for no-fault benefits may be located in rural areas.

2. Reporting, recordkeeping and other compliance requirements: This rule does not impose any additional paperwork.

3. Costs: This rule does not impose compliance costs on state or local governments. The rule should reduce costs for no-fault insurers, which may include local governments who self-fund their no-fault insurance benefits, because it will permit the Superintendent, Commissioner of Health, or Commissioner of Education to prohibit, after notice and a hearing, health service providers who engage in certain unlawful conduct from demanding or requesting payment from no-fault insurers. The rule also should reduce costs for New York consumers in the form of reduced automobile insurance premiums.

4. Minimizing adverse impact: This rule affects uniformly health service providers and no-fault insurers in both rural and non rural areas of New York State and the rule is mandated by statute. The Department of Financial Services does not believe that it will have an adverse impact on rural areas.

5. Rural area participation: The Department issued a press release regarding the rule on March 8, 2012; emailed notice of Insurance Law § 5109 and the rule on March 14, 2012 to health service provider organizations, such as the Medical Society of the State of New York, New York State Chiropractic Association, and Acupuncture Society of New York; has posted a copy of the rule on its website continually since March 9, 2012; and published the rule in the State Register. In addition, interested parties were given an opportunity to comment on the proposed regulation that was published in the State Register on March 13, 2013.

Revised Job Impact Statement

Neither the proposed rule that was published in the State Register on March 13, 2013 nor the emergency measure amending 11 NYCRR 65 indicated whether the Superintendent or noticing commissioner may prohibit a person from billing a no-fault insurer for a specified period of time rather than permanently. This revised rule clarifies that the Superintendent or noticing commissioner may prohibit a person from billing no-fault insurers for a specified period as determined by the Superintendent. This revision to the rule requires no change to the JIS.

Assessment of Public Comment

The agency received no public comment.

Department of Health

EMERGENCY RULE MAKING

Reduction to Statewide Base Price

I.D. No. HLT-32-13-00005-E
Filing No. 775
Filing Date: 2013-07-22
Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 86-1.16 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2807-c(35)

Finding of necessity for emergency rule: Preservation of public health.

Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to achieve targeted savings.

Public Health Law section 2807-c(35)(b) specifically provides the Commissioner of Health with authority to issue hospital inpatient rate-setting regulations as emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

Subject: Reduction to Statewide Base Price.

Purpose: Continues a reduction to the statewide base price for inpatient services.

Text of emergency rule: Pursuant to the authority vested in the Commissioner of Health by section 2807-c(35)(b) of the Public Health Law, Subdivision (c) of section 86-1.16 of Subpart 86-1 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective May 1, 2012, to read as follows:

(c)*(1)* For the period effective July 1, 2011 through March 31, 2012, the statewide base price shall be adjusted such that total Medicaid payments are decreased by $24,200,000.

(2) For the period May 1, 2012 through March 31, 2013 and for state fiscal year periods on and after April 1, 2013, the statewide base price shall be adjusted such that total Medicaid payments are decreased for such period and for each such state fiscal year period by $19,200,000.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 19, 2013.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The requirement to implement a modernized Medicaid reimbursement system for hospital inpatient services based upon 2005 base year operating costs pursuant to regulations is set forth in Section 2807-c(35) of the Public Health Law, which states that the Commissioner has the authority to set emergency regulations for general hospital inpatient rates and such regulations shall include but not be limited to a case-mix neutral Statewide base price. Such Statewide base price will exclude certain items specified in the statute and any other factors as may be determined by the Commissioner.

Legislative Objectives:

The Legislature and Medicaid Redesign Team adopted a proposal to reduce unnecessary cesarean deliveries to promote quality care and reduce unnecessary expenditures. Due to industry concerns with the initial proposal, it was determined that a more clinically sound method needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop a more clinically sound approach to meet Legislative objectives. Based on the results of workgroup meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference.

Needs and Benefits:

The proposed amendment appropriately implements the provisions of Public Health Law section 2807-c(35)(b)(xii), which authorizes the Commissioner to address the inappropriate use of cesarean deliveries. Cesarean deliveries are surgical procedures that inherently involve risks; however, elective cesarean deliveries increase the risks unnecessarily. Therefore, high rates of cesarean deliveries are increasingly viewed as indicative of quality of care issues.

Due to industry concerns with the initial proposal, it was determined that a more clinically sound approach to meeting Legislative objectives needed to be developed. To generate immediate savings, however, a $24.2 million gross ($12.1 million State share) reduction in the statewide base price was implemented for 2011-12 while an obstetrical workgroup worked to develop such an approach. Based on the results of those meetings, a new proposal was developed which achieved less savings than required by the Financial Plan ($5 million gross/$2.5 million State share). Therefore, this emergency amendment continues the base price reduction at $19.2 million gross ($9.6 million State share) to account for the difference for periods subsequent to the 2011-12 state fiscal year.

COSTS:

Costs to State Government:

There are no additional costs to State government as a result of this amendment.

Costs of Local Government:
There will be no additional cost to local governments as a result of these amendments.
Costs to the Department of Health:
There will be no additional costs to the Department of Health as a result of this amendment.
Local Government Mandates:
The proposed amendments do not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.
Paperwork:
There is no additional paperwork required of providers as a result of these amendments.
Duplication:
These regulations do not duplicate existing State and Federal regulations.
Alternatives:
No significant alternatives are available at this time. In collaboration with the hospital industry, the State developed a more clinically sound method to achieve savings. However, this amount was less than was required by the Financial Plan. Thus, there is no option to not act on this initiative since the Enacted Budget assumed savings that total $24.2 million.
Federal Standards:
This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.
Compliance Schedule:
The proposed amendment to section 86-1.16 requires that the statewide base price be reduced by $19,200,000 for the period May 1, 2012, through March 31, 2013 and for each state fiscal year period thereafter.

Regulatory Flexibility Analysis

Effect on Small Business and Local Governments:
For the purpose of this regulatory flexibility analysis, small businesses were considered to be general hospitals with 100 or fewer full time equivalents. Based on recent financial and statistical data extracted from the Institutional Cost Report, seven hospitals were identified as employing fewer than 100 employees.
Health care providers subject to the provisions of this regulation under section 2807-c(35) of the Public Health Law will see a minimal decrease in funding as a result of the reduction in the statewide base price.
This rule will have no direct effect on Local Governments.
Compliance Requirements:
No new reporting, recordkeeping or other compliance requirements are being imposed as a result of these rules. Affected health care providers will bill Medicaid using procedure codes and ICD-9 codes approved by the American Medical Association, as is currently required. The rule should have no direct effect on Local Governments.
Professional Services:
No new or additional professional services are required in order to comply with the proposed amendments.
Compliance Costs:
As a result of the new provision of 86-1.16, overall statewide aggregate hospital Medicaid revenues for hospital inpatient services will decrease in an amount corresponding to the total statewide base price reduction.
Economic and Technological Feasibility:
Small businesses will be able to comply with the economic and technological aspects of this rule. The proposed amendments are technologically feasible because it requires the use of existing technology. The overall economic impact to comply with the requirements of this regulation is expected to be minimal.
Minimizing Adverse Impact:
The proposed amendments reflect statutory intent and requirements.
Small Business and Local Government Participation:
Hospital associations participated in discussions and contributed comments through the State's Medicaid Redesign Team process regarding these changes.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:
This rule applies uniformly throughout the state, including rural areas. Rural areas are defined as counties with a population less than 200,000 and counties with a population of 200,000 or greater that have towns with population densities of 150 persons or fewer per square mile. The following 43 counties have a population of less than 200,000 based upon the United States Census estimated county populations for 2010 (http://quickfacts.census.gov). Approximately 17% of small health care facilities are located in rural areas.

Allegany County	Greene County	Schoharie County
Cattaraugus County	Hamilton County	Schuyler County
Cayuga County	Herkimer County	Seneca County
Chautauqua County	Jefferson County	St. Lawrence County
Chemung County	Lewis County	Steuben County
Chenango County	Livingston County	Sullivan County
Clinton County	Madison County	Tioga County
Columbia County	Montgomery County	Tompkins County
Cortland County	Ontario County	Ulster County
Delaware County	Orleans County	Warren County
Essex County	Oswego County	Washington County
Franklin County	Otsego County	Wayne County
Fulton County	Putnam County	Wyoming County
Genesee County	Rensselaer County	Yates County
	Schenectady County	

The following counties have a population of 200,000 or greater and towns with population densities of 150 persons or fewer per square mile. Data is based upon the United States Census estimated county populations for 2010.

Albany County	Monroe County	Orange County
Broome County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	

Compliance Requirements:
No new reporting, recordkeeping, or other compliance requirements are being imposed as a result of this proposal.
Professional Services:
No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.
Compliance Costs:
No initial capital costs will be imposed as a result of this rule, nor is there an annual cost of compliance.
Minimizing Adverse Impact:
The proposed amendments reflect statutory intent and requirements.
Rural Area Participation:
This amendment is the result of discussions with industry associations as part of the Medicaid Redesign team process. These associations include members from rural areas. As well, the Medicaid Redesign Team held multiple regional hearings and solicited ideas through a public process.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent from the nature and purpose of the proposed rule that it will not have a substantial adverse impact on jobs or employment opportunities. The proposed emergency regulation revises the final statewide base price for the period beginning May 1, 2012, through March 31, 2013 and for each state fiscal year thereafter.

EMERGENCY RULE MAKING

Statewide Pricing Methodology for Nursing Homes

I.D. No. HLT-32-13-00016-E
Filing No. 780
Filing Date: 2013-07-23
Effective Date: 2013-07-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:
Action taken: Addition of section 86-2.40 to Title 10 NYCRR.
Statutory authority: Public Health Law, section 2808(2-c)
Finding of necessity for emergency rule: Preservation of public health.
Specific reasons underlying the finding of necessity: It is necessary to issue the proposed regulations on an emergency basis in order to implement, as expeditiously as possible, the new Medicaid reimbursement methodology for nursing homes, effective January 1, 2012. The new

methodology will replace an overly complex and burdensome methodology with a transparent pricing methodology that will stabilize the nursing home industry by timely providing predictable rate setting information that can be effectively used by providers to plan and manage their operations. In addition, implementing the pricing methodology as soon as possible will also mitigate the retroactive cash flow impact of reconciling rates that are paid today to the new pricing rates effective on January 1, 2012.

Proceeding with the proposed regulations on an emergency basis is in accordance with the provisions of Public Health Law section 2808 (2-c) which provides the Commissioner of Health the explicit authority to issue these emergency regulations.

Further, there is compelling interest in enacting these regulations immediately in order to secure federal approval of the associated Medicaid State Plan Amendment.

Subject: Statewide Pricing Methodology for Nursing Homes.

Purpose: To establish a new Medicaid reimbursement methodology for Nursing Homes.

Substance of emergency rule: This regulation establishes a new reimbursement methodology for the operating component of non-specialty residential health care facilities (nursing homes). The operating component of the price is based upon allowable costs and is the sum of the direct price, indirect price and a facility-specific non-comparable price. The direct and indirect prices are a blend of a statewide price and a peer group price. There are two peer groups: 1) all non-specialty hospital-based facilities and non-specialty freestanding facilities with certified beds capacities of 300 or more, and 2) non-specialty freestanding facilities with certified bed capacities of less than 300 beds. The direct price is subject to a case mix adjustment and a wage index adjustment. The new case mix adjustment methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment associated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis. The indirect price is subject to a wage index adjustment. Per-diem adjustments to the operating component of the rate include add-ons for bariatric, traumatic brain-injured (TBI) extended care, and dementia residents; adjustments for the reporting of quality data; and transition payments. Non-specialty facilities will transition to the price over a five-year period (2012-2016), with prices fully implemented beginning in 2017. The non-capital component of the rate for specialty facilities, which are not subject to the new reimbursement methodology, will be the rates in effect for such facilities on January 1, 2009.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 20, 2013.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Regulatory Impact Statement

Statutory Authority:

The statutory authority for this regulation is contained in Section 2808(2-c) of the Public Health Law (PHL) as enacted by Section 95 of Part H of Chapter 59 of the Laws of 2011, which authorizes the Commissioner to promulgate emergency regulations, with regard to Medicaid reimbursement rates for residential health care facilities. Such rate regulations are set forth in Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules, and Regulation of the State of New York.

Legislative Objectives:

Subpart 86-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulation of the State of New York, will be amended by adding a new section 2.40 to establish a new Medicaid reimbursement methodology for nursing homes. The reimbursement methodology is based on a blend of statewide prices and peer group prices, with adjustments for case mix, regional wage differences, add-ons for certain patients, and quality incentives and payments. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new and streamlined methodology will significantly reduce administrative burdens on both nursing homes and the Department and, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

Needs and Benefits:

The new pricing reimbursement methodology reforms and replaces an outdated, complex, and administratively burdensome (to both providers and the Department) rate-setting system with a stable, predictable and transparent methodology that rewards efficiencies and incentivizes quality outcomes. The new pricing system will also provide a good foundation for the transition of nursing home residents to managed care that will occur over the next several years. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation. The new methodology also contains mechanisms to safeguard the integrity of case mix data reporting. If reported case mix data indicates a change in the facility's case mix of more than five percent, the payment adjustment associated with the change over five percent may be held, pending an audit to verify the accuracy of the reported data. Also, facilities are required to formally certify to the accuracy of their case mix data reporting on an annual basis.

Costs to Private Regulated Parties:

There will be no additional costs to private regulated parties. The only additional data requested from providers would be reporting quality measures in their annual cost report.

Costs to State Government:

There is no additional aggregate increase in Medicaid expenditures anticipated as a result of these regulations.

Costs to Local Government:

Local districts' share of Medicaid costs is statutorily capped; therefore, there will be no additional costs to local governments as a result of this proposed regulation.

Costs to the Department of Health:

There will be no additional costs to the Department of Health as a result of this proposed regulation.

Local Government Mandates:

The proposed regulation does not impose any new programs, services, duties or responsibilities upon any county, city, town, village, school district, fire district or other special district.

Paperwork:

The proposed regulation does not create new or additional paperwork responsibility of any kind.

Duplication:

These regulations do not duplicate existing state or federal regulations.

Alternatives:

The Department is required by the Public Health Law section 2808 2-c to implement the new pricing methodology. The department worked closely with the Nursing Home Industry Associations to develop the details of the pricing methodology to be implemented by the regulation.

Federal Standards:

The proposed regulation does not exceed any minimum standards of the federal government for the same or similar subject area.

Compliance Schedule:

The new prices will be published by the department and transmitted to the EMedNY system. There are no new compliance efforts required by the nursing homes.

Regulatory Flexibility Analysis

Effect of Rule:

For the purpose of this regulatory flexibility analysis, small businesses were considered to be residential health care facilities with 100 or fewer employees. Based on recent financial and statistical data extracted from Residential Health Care Facility Cost Reports, approximately 60 residential health care facilities were identified as employing fewer than 100 employees.

To ensure a smooth transition and mitigate significant swings in Medicaid revenues, the new Medicaid reimbursement methodology for nursing homes implemented by this regulation will be phased-in over a five year period (full implementation in the sixth year). Of the 60 nursing homes, 36 nursing homes that are subject to this regulation will experience a decrease in Medicaid revenues. The losses in Medicaid revenues will occur gradually – and will increase from.473% of total operating revenue in year one to 5.4% of total operating revenue in year six. Twenty-four nursing homes that are subject to this regulation will experience an increase in Medicaid revenues. The gains in Medicaid revenues will occur gradually – and will increase from 1.2% of total operating revenue in year one to 2% of total operating revenue in year six. In addition, the new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.

This rule will have no direct effect on local governments.

Compliance Requirements:

There are no new compliance requirements.

Professional Services:

No new or additional professional services are required in order to comply with the proposed amendments.

Compliance Costs:
No additional compliance costs are anticipated as a result of this rule.
Economic and Technological Feasibility:
The proposed rule doesn't require additional technological or economic requirements.
Minimizing Adverse Impact:
To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.
Small Business and Local Government Participation:
The State filed a Federal Public Notice, published in the State Register, prior to the effective date of the change. The Notice provided a summary of the action to be taken and instructions as to where the public, including small businesses and local governments, could locate copies of the corresponding proposed State Plan Amendment. The Notice further invited the public to review and comment on the related proposed State Plan Amendment. The Department worked closely with the major nursing home industry associations to develop the details of the pricing methodology to be implemented by the regulation. In addition, contact information for the Department was provided for anyone interested in further information.

Rural Area Flexibility Analysis

Effect on Rural Areas:
Rural areas are defined as counties with populations less than 200,000 and, for counties with populations greater than 200,000, include towns with population densities of 150 persons or less per square mile. The following 43 counties have populations of less than 200,000:

Allegany	Hamilton	Schenectady
Cattaraugus	Herkimer	Schoharie
Cayuga	Jefferson	Schuyler
Chautauqua	Lewis	Seneca
Chemung	Livingston	Steuben
Chenango	Madison	Sullivan
Clinton	Montgomery	Tioga
Columbia	Ontario	Tompkins
Cortland	Orleans	Ulster
Delaware	Oswego	Warren
Essex	Otsego	Washington
Franklin	Putnam	Wayne
Fulton	Rensselaer	Wyoming
Genesee	St. Lawrence	Yates
Greene		

The following nine counties have certain townships with population densities of 150 persons or less per square mile:

Albany	Erie	Oneida
Broome	Monroe	Onondaga
Dutchess	Niagara	Orange

Compliance Requirements:
There are no new compliance requirements as a result of the proposed rule.
Professional Services:
No new additional professional services are required in order for providers in rural areas to comply with the proposed amendments.
Compliance Costs:
No additional compliance costs are anticipated as a result of this rule.
Minimizing Adverse Impact:
To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year. The new methodology will also, by limiting the potential bases of subsequent administrative rate appeals and audit adjustments, enhance the stability and certainty of initial Medicaid payments and reduce the likelihood of litigation.
Rural Area Participation:
The Department, in collaboration with the major nursing home industry associations (which include representation of rural nursing homes), worked collaboratively to develop the key components of the statewide pricing methodology. In addition, a Federal Public Notice, published in the New York State Register invited comments and questions from the general public.

Job Impact Statement

A Job Impact Statement is not required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is not expected that the proposed rule to establish a new Medicaid reimbursement methodology for nursing homes will have a material impact on jobs or employment opportunities across the nursing home industry. To ensure a smooth transition to the new pricing methodology by mitigating significant fluctuations (increases or decreases) in the amount of Medicaid revenues received by nursing homes, per diem transition rate adjustments will be included in the proposed regulations to phase-in the new pricing methodology over a five-year period, with full implementation in the sixth year.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Death Certificates

I.D. No. HLT-32-13-00015-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: This is a consensus rule making to amend section 35.4 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 4100(1)

Subject: Death Certificates.

Purpose: To issue a death certificate to any applicant upon the request of a sibling of the deceased.

Text of proposed rule: Paragraph (2) of subdivision (b) of Section 35.4 is amended as follows:

* * *

(b) A certified copy of a death certificate or a certified transcript of a death certificate shall be issued only:

(1) pursuant to the order of a court of competent jurisdiction on a showing of necessity, or

(2) upon specific request of the spouse, *sibling,* children, or parents of the deceased or the lawful representative of such persons; or

* * *

Text of proposed rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.state.ny.us

Data, views or arguments may be submitted to: Same as above.

Public comment will be received until: 45 days after publication of this notice.

This rule was not under consideration at the time this agency submitted its Regulatory Agenda for publication in the Register.

Consensus Rule Making Determination

Statutory Authority:
The Department and Commissioner are authorized to promulgate this regulatory revision pursuant to Public Health Law (PHL) Article 41, Vital Records. PHL Section 4100(1) provides in relevant part that the Department shall, except in the City of New York, have charge of the registration of deaths and provide instructions for obtaining records of death. In addition, PHL Section 4100(2) specifies that the Commissioner shall have general supervision of vital statistics, except in the City of New York.
Chapter 130 of the Laws of 2012 amended PHL Section 4174, effective July 18, 2012, to authorize the DOH to issue death certificates upon the request of a sibling of the deceased.
Basis:
The proposed amendment merely conforms State regulation to State law (PHL Section 4174) as revised by Chapter 130 of the Laws of 2012. Section 35.4(b)(2) of Title 10 NYCRR, as currently written, is out of compliance with PHL Section 4174. Since Chapter 130 of the Laws of 2012 became effective July 18, 2012, the Department sent an email to each municipal registrar which informed the affected parties of the law change and the impact on their operations. Registrars were directed to

ensure that siblings be able to receive copies of their siblings death certificates and were provided with a copy of the law. They are currently required to be in compliance.

Job Impact Statement

No Job Impact Statement is required pursuant to Section 201a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have a substantial adverse impact on jobs and employment opportunities.

Chapter 130 of the Laws of 2012 amended PHL Section 4174 to authorize the DOH to issue death certificates upon the request of a sibling of the deceased. This law came into effect on July 18, 2012.

The proposed amendment merely conforms State regulation to State law (PHL Section 4174) as revised by Chapter 130 of the Laws of 2012. Section 35.4(b)(2) of Title 10 NYCRR, as currently written, is out of compliance with PHL Section 4174. Since the revision to PHL Section 4174 became effective July 18, 2012, the Department sent an email to each municipal registrar which informed affected parties of the law change and the impact on their operations. Registrars were directed to ensure that siblings be able to receive copies of their siblings death certificates and were provided with a copy of the law. They are currently required to be in compliance.

Categories and Numbers Affected:

These provisions will apply to the 1500 registrars in New York State.

Regions of Adverse Impact:

This rule is not expected to cause any regions in the State to have an adverse job impact.

Minimizing Adverse Impact:

There will be no adverse impact to this proposal because registrars are already required to be in compliance with Chapter 130 of the Laws of 2012 which amended the PHL and which became effective on July 18, 2012.

Department of Motor Vehicles

EMERGENCY RULE MAKING

A3 Restriction

I.D. No. MTV-32-13-00002-E

Filing No. 767

Filing Date: 2013-07-18

Effective Date: 2013-07-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of section 3.2 of Title 15 NYCRR.

Statutory authority: Vehicle and Traffic Law, sections 215(a) and 501(2)(c)

Finding of necessity for emergency rule: Preservation of public safety.

Specific reasons underlying the finding of necessity: Effective Jan 30, 2009, the Federal Motor Carrier Administration (FMCSA) adopted revisions to 49 CFR Parts 383, 384, 390 and 391, which, among other things, require states to modify their driver licensing processes for the issuance of Commercial Drivers Licenses (CDL). Specifically, the regulations require states to collect, record and disseminate medical certification information on qualifying types of CDL drivers. Certain types of drivers are exempt from the medical certification requirement and each state has the option to require or exempt certain types of intrastate operation from the medical certificate requirement.

Failure to comply with the federal regulation by January 30, 2012, subjected states to a penalty of up to 5% of their federal highway funds if FMCSA declared the state out of compliance and if the FMCSA had not approved an action plan submitted by the state demonstrating its path to compliance. The FMCSA deemed New York State out of compliance but approved the State's action plan to come into compliance.

A critical piece of New York's action plan is contacting the 560,000 CDL holders and providing them with the opportunity to both declare their driving type and provide a medical certificate if their driving type requires one. (Part 383.5 defines four types of drivers—Non-excepted interstate, excepted interstate, non-excepted intrastate and excepted intrastate.) As part of the State's planning and ongoing communication with FMCSA, the State has determined that the latest date that the DMV can start mailing notices to drivers and have a reasonable chance of completing the entire enrollment process by January 30, 2014, the next federal compliance date, is July 18, 2013. This leaves 6 months to contact the drivers, have them respond, enter the driver information, and then contact drivers who are non-compliant to begin the process of downgrading such non-compliant driver's licenses from a CDL to a non-CDL. This process presupposes approximately 93,000 contacts per month between the DMV and the CDL holders.

The proposed amendment is integral to the process of contacting 560,000 CDL holders, since many of such holders will need to have the A3 restriction recorded on their driver's license, because they are exempt from the medical requirements. Because the proposed amendment significantly expands the scope of the restriction, it is critical that the CDL holders are aware of all of the categories covered by the new A3 restriction. The current version of the A3 restriction only exempts school bus and municipal drivers, while the new version covers 12 exempt categories. If the new A3 restriction is not in place when the DMV begins the process of notifying drivers, drivers who are eligible for the A3 restriction will not be able to be served in DMV offices or by mail. Therefore, the number of drivers who could be processed will be reduced. It is expected based on current information that the A3 designation will be a popular selection as it reduces the burden on the drivers who qualify. Without the legal authority to place the revised A3 restriction on the driver record and license, the DMV would need to delay implementation of programming to implement such restriction. Delays in computer programming will inordinately delay the implementation of the entire program.

DMV needs to contact, and then collect information from and take subsequent action regarding all of the affected drivers before January 30, 2014. Because of the sheer number of drivers involved (560,000), any delay in starting the process places the State in serious risk of not meeting required deadlines. Should FMCSA take note of the delay, they have the option to declare us out of compliance and withhold up to $65 million in state highway funds from NYS DOT as of October 1, 2013.

Subject: A3 restriction.

Purpose: Expands the scope of the A3 restriction for CDL holders who are exempt from certain federal medical standards.

Text of emergency rule: Paragraph (3) of subdivision (c) of section 3.2 is amended to read as follows:

A3 [SCHOOL BUS/MUNICIPAL VEHICLE] *Med Cert Exempt*

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires October 15, 2013.

Text of rule and any required statements and analyses may be obtained from: Heidi Bazicki, Department of Motor Vehicles, 6 Empire State Plaza, Rm. 522A, Albany, NY 12228, (518) 474-0871, email: heidi.bazicki@dmv.ny.gov

Regulatory Impact Statement

1. Statutory authority: Vehicle and Traffic Law (VTL) section 215(a) provides that the Commissioner of Motor Vehicles may enact rules and regulations that regulate and control the exercise of the powers of the Department of Motor Vehicles (DMV). Section 501(2)(c) of the VTL provides that the Commissioner may by regulation provide for additional restrictions based upon other types of vehicles or other factors deemed appropriate by the Commissioner.

2. Legislative objectives: Section 501(2)(c) of the VTL authorizes the Commissioner to establish driver license restrictions when necessary to comply with statutory and/or programmatic needs. On December 1, 2008, the Federal Motor Carrier Safety Administration (FMCSA) published a final rule in the Federal Register (73 Fed. Reg. 73096) that amended 49 CFR 383, 384, 390 and 391 to require states to modify their driver licensing processes for the issuance of Commercial Drivers Licenses (CDL). The rule was effective January 30, 2009. Specifically, the federal regulations require states to collect, record and appropriately disseminate medical certification information on qualifying types of CDL drivers. The federal regulations permit the states to exempt certain categories of CDL holders from the medical certification requirements. In accordance with this authority, New York State has decided to exempt several categories of CDL holders from the medical certification requirements. This regulation establishes the A3 "Med Cert Exempt" restriction, which will be placed on the driver's licenses of persons included in one of the exempt categories.

3. Needs and benefits: The purpose of this regulation is to establish the A3 "Med Cert Exempt" restriction for CDL holders who are exempt from the federal medical certification requirements. Specifically, the federal regulations require states to collect, record and appropriately disseminate medical certification information on qualifying types of CDL drivers.

The federal law provides that no person shall operate a commercial motor vehicle unless such person meets the physical qualifications and physical examination requirements, as set forth in 49 CFR 391.41 and 391.43. Drivers performing "non-excepted" operation must meet the physical qualification requirements contained in 49 CFR 391 and must obtain a Medical Examiner's Certificate. Drivers performing "excepted operation" are

exempt from federal and state regulations requiring a Medical Examiner's Certificate. Such "excepted" drivers must have the A3 Restriction recorded on their driver's license, which indicates that they are exempt from the medical requirements.

Currently, the A3 restriction only exempts school bus and municipal drivers from the medical requirements. However, under federal regulations (49 CFR 390.3 and 391.2) and New York State DOT regulations (17 NYCRR 721.3(f) and 820.3), the State must exempt other drivers from the federal medical requirements, including drivers who operate commercial motor vehicles:

Transporting school children and/or school staff between home and school (49 CFR 390.3(f)(1));

As federal, State or local government employees (49 CFR 390.3(f)(2));

Transporting human corpses or sick or injured persons (49 CFR 309.3(f)(4));

Driving fire truck or rescue vehicles during emergencies and other related activities (49 CFR 390.3(f)(5));

Primarily in the transportation of propane winter heating fuel when responding to an emergency condition requiring immediate response such as damage to a propane gas system after a storm or flooding (49 CFR 390.3(f)(7));

In response to a pipeline emergency condition requiring immediate response such as a pipeline leak or rupture (49 CFR 390.3(f)(7));

In custom harvesting on a farm or to transport farm machinery and supplies used in the custom harvesting operation to and from a farm or to transport custom harvested crops to a storage or market (49 CFR 391.2(a));

As a beekeeper in the seasonal transportation of bees (49 CFR 391.2(b));

That are farm vehicles, but not combination vehicles (power unit and towed unit), used to transport agricultural products, farm machinery or farm supplies (no placardable hazardous materials) to and from a farm and within 150 air-miles of the farm (49 CFR 391.2(c));

As a private motor carrier of passengers for non-business purposes (49 CFR 390.3(f)(6));

Transporting migrant workers (49 CFR 398.3(b));

Drivers who obtained their CDL prior to September 9, 1999, which is the date that NYS Department of Transportation adopted regulations incorporating by reference the federal medical requirements for commercial motor vehicle operators (17 NYCRR 721.3(f) and 820.3).

This proposed rule is necessary to put CDL applicants and CDL holders on notice about the scope of the medical certification exemption, so that the A3 restriction is applied to their driver's licenses and driving records when appropriate.

4.Costs:

a. Cost to regulated parties and customers: There is no cost to the citizens of the State.

b: Costs to the agency and local governments: There is no cost to local governments or to DMV.

5. Local government mandates: There are no local government mandates.

6. Paperwork: There are no new paperwork requirements associated with this proposed rule.

7. Duplication: This proposal does not duplicate, overlap or conflict with any relevant rule or legal requirement of the State and federal governments.

8. Alternatives: A no action alternative was not considered because CDL holders must have the option of obtaining a CDL with the A3 restriction, if appropriate.

9. Federal standards: The proposal does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: The proposed rule would take effect immediately.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for Small Businesses and Local Governments is not attached because this rule will not have a disproportionate impact on small businesses or local governments, nor will it impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

A RAFA is not attached because this rule will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A Job Impact Statement is not submitted with this rule because it will not have an adverse impact on job creation or development.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Allowing for an Emergency Economic Development Program to Assist in the Restoration of Utility Service to Storm Damaged Property

I.D. No. PSC-32-13-00003-EP

Filing Date: 2013-07-19

Effective Date: 2013-07-19

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Proposed Action: The PSC adopted an order allowing Niagara Mohawk Power Corporation d/b/a National Grid to implement an Emergency Economic Development Program to assist service restoration efforts to damaged areas in the Company's service territory caused by severe flooding from recent rainstorms.

Statutory authority: Public Service Law, sections 5, 65 and 66

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: This action is taken on an emergency basis pursuant to State Administrative Procedure Act (SAPA) § 202(6). Failure to grant the requested relief on an emergency basis could result in the prolonged interruption of utility service to certain customers who own property damaged by severe recent flooding from recent storms. Such results would adversely impact the public safety, health and general welfare of the citizens of New York. As a result, compliance with the advance notice and comment requirements of SAPA § 202(1) would be contrary to the public interest, and an immediate waiver of certain requirements of 16 NYCRR § 255.604 is necessary for the preservation of the public health, safety and general welfare.

Subject: Allowing for an Emergency Economic Development Program to assist in the restoration of utility service to storm damaged property.

Purpose: The Program will allow timely restoration of utility service to customers whose property was damaged by recent storm flooding.

Substance of emergency/proposed rule (Full text is posted at the following State website:www.dps.ny.gov): The Public Service Commission adopted an order allowing Niagara Mohawk Power Corporation d/b/a National Grid (NMPC) to implement an Emergency Economic Development Program permitting the Company to provide up to $2 million in total in economic aid through grants of up to $50,000 per qualified customer to the Company's customers who have been impacted by severe flooding from recent storms to the extent necessary to position the customer's property to take service from National Grid. NMPC is to fund the program from its existing allowance as contained in a recent Joint Proposal that was adopted by a Commission Order in March 2013. Program funds are available to be used by non-residential customers for restoration of utility service efforts.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire October 16, 2013.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the amended rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

NOTICE OF ADOPTION

Approval to Appoint a Temporary System Operator of the Painted Apron Water Company, Inc.

I.D. No. PSC-50-11-00006-A
Filing Date: 2013-07-22
Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving a temporary system operator of Painted Apron Water Company, Inc.

Statutory authority: Public Service Law, sections 4(1), 5(1)(f), 25, 89-b(1), 89-c(b), (4), 89(j) and 112(a)

Subject: Approval to appoint a temporary system operator of the Painted Apron Water Company, Inc.

Purpose: To approve the appointment of a temporary system operator of the Painted Apron Water Company, Inc.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving a petition of the Painted Apron Water Committee appointing it as the temporary system operator of the Painted Apron Water Company, Inc., subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-W-0640SA1)

NOTICE OF ADOPTION

Denying Chaffee Water Works Company's Request for Additional Funding for Expenditures

I.D. No. PSC-26-12-00014-A
Filing Date: 2013-07-19
Effective Date: 2013-07-19

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order denying Chaffee Water Works Company's request for additional funding for expenditures to finish the rehabilitation of the water company.

Statutory authority: Public Service Law, section 89-c and f

Subject: Denying Chaffee Water Works Company's request for additional funding for expenditures.

Purpose: To deny Chaffee Water Works Company's request for additional expenditures.

Substance of final rule: The Commission, on July 18, 2013, adopted an order denying Chaffee Water Works Company's (Chaffee or the Company) request for additional funding because the New York State Environmental Facilities Corporation made no commitment to increase the amount of Chaffee's loan and the Company failed to justify and substantiate the reasonableness of recovering the additional funds from ratepayers, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-W-0260SA1)

NOTICE OF ADOPTION

Approving the Disposition of Property Tax Benefits

I.D. No. PSC-30-12-00008-A
Filing Date: 2013-07-23
Effective Date: 2013-07-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving a joint proposal for the disposition of property tax benefits for the Town of Monroe and the City of Middletown.

Statutory authority: Public Service Law, sections 2, 5, 89-b and 113(2)

Subject: Approving the disposition of property tax benefits.

Purpose: To approve the disposition of property tax benefits.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving a joint proposal between Orange and Rockland Utilities, Inc. and Department of Public Service Staff regarding the disposition of property tax refunds from the Town of Monroe and the City of Middletown, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-M-0205SA1)

NOTICE OF ADOPTION

Authorizing UWON to Recover Revenue Through a Storm Surcharge Related to Tropical Storm Lee

I.D. No. PSC-51-12-00007-A
Filing Date: 2013-07-22
Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving United Water Owego-Nichols, Inc.'s (UWON) petition authorizing a storm surcharge recovery of $445,661 in storm costs resulting from Tropical Storm Lee.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Authorizing UWON to recover revenue through a storm surcharge related to Tropical Storm Lee.

Purpose: To authorize UWON to recover revenue through a storm surcharge related to Tropical Storm Lee.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving United Water Owego-Nichols, Inc.'s petition authorizing a storm surcharge recovery of $445,661 of net capital expenditures and expenses resulting from Tropical Storm Lee, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(12-W-0534SA1)

NOTICE OF ADOPTION

Directing Chaffee Water Works Company's to Turn Over Payments Received from a Third Party

I.D. No. PSC-07-13-00017-A
Filing Date: 2013-07-19
Effective Date: 2013-07-19

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order directing Chaffee Water Works Company to transfer annual payments from Gernatt Asphalt Products, Inc. to the New York State Environmental Facilities Corporation.

Statutory authority: Public Service Law, section 89-c

Subject: Directing Chaffee Water Works Company's to turn over payments received from a third party.

Purpose: To direct Chaffee Water Works Company's to turn over payments received from a third party.

Substance of final rule: The Commission, on July 18, 2013, adopted an order directing Chaffee Water Works Company to transfer annual payments received from Gernatt Asphalt Products, Inc. to the New York State Environmental Facilities Corporation within seven days of receiving the payments, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-W-1407SA2)

NOTICE OF ADOPTION

Approving the Use of the Rosemount 8800 Series Vortex Flowmeter

I.D. No. PSC-07-13-00018-A
Filing Date: 2013-07-23
Effective Date: 2013-07-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. to allow the use of the Rosemount 8800 Series Vortex Flowmeter for customer billing applications in New York State.

Statutory authority: Public Service Law, section 80(10)

Subject: Approving the use of the Rosemount 8800 Series Vortex Flowmeter.

Purpose: To approve the use of the Rosemount 8800 Series Vortex Flowmeter.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. for use of the Rosemount 8800 Series Vortex Flowmeter for steam revenue billing in residential and commercial applications.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-S-0027SA1)

NOTICE OF ADOPTION

Approving a Limited Waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings

I.D. No. PSC-14-13-00003-A
Filing Date: 2013-07-23
Effective Date: 2013-07-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving Consolidated Edison Co. of NY, Inc.'s petition for a limited waiver of the 150-day rule set forth in the Commission's Policy Statement on Test Periods in Major Rate Proceedings in a major electric rate case.

Statutory authority: Public Service Law, sections 4(1), 65(1), 66(1) and (12)

Subject: Approving a limited waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings.

Purpose: To approve a limited waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. for a limited waiver of the Commission's "Statement of Policy on Test Periods in Major Rate Proceedings" in a major electric rate case, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-E-0030SA1)

NOTICE OF ADOPTION

Approving a Limited Waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings

I.D. No. PSC-14-13-00006-A
Filing Date: 2013-07-23
Effective Date: 2013-07-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving Consolidated Edison Co. of New York, Inc.'s petition for a limited waiver of the 150-day rule set forth in the Commission's Policy Statement on Test Periods in Major Rate Proceedings in a major gas rate case.

Statutory authority: Public Service Law, sections 4(1), 65(1), 66(1) and (12)

Subject: Approving a limited waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings.

Purpose: To approve a limited waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. for a limited waiver of the Commission's "Statement of Policy on Test Periods in Major Rate Proceedings" in a major gas rate case, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0031SA1)

NOTICE OF ADOPTION

Approving a Limited Waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings

I.D. No. PSC-14-13-00008-A
Filing Date: 2013-07-23
Effective Date: 2013-07-23

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving Consolidated Edison Co. of New York, Inc's petition for a limited waiver of the 150-day rule set forth in the Commission's Policy Statement on Test Periods in Major Rate Proceedings in a major steam rate case.

Statutory authority: Public Service Law, sections 4(1), 79(1) and 80(10)

Subject: Approving a limited waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings.

Purpose: To approve a limited waiver of the Commission's Policy Statement on Test Periods in Major Rate Proceedings.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. for a limited waiver of the Commission's "Statement of Policy on Test Periods in Major Rate Proceedings" in a major steam rate case, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-S-0032SA1)

NOTICE OF ADOPTION

Allowing Revisions to SC No. 8 — Seller Service to Go into Effect

I.D. No. PSC-19-13-00007-A
Filing Date: 2013-07-18
Effective Date: 2013-07-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC allowed a tariff filing by KeySpan Gas East Corporation d/b/a National Grid proposing revisions to Service Classification (SC) No. 8 — Seller Service to go into effect.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Allowing revisions to SC No. 8 — Seller Service to go into effect.

Purpose: To allow revisions to SC No. 8 — Seller Service to go into effect.

Substance of final rule: The Commission, on July 18, 2013, allowed the tariff filing by KeySpan Gas East Corporation d/b/a National Grid to remove language under Service Classification No. 8 — Seller Service to go into effect.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0180SA1)

NOTICE OF ADOPTION

Allowing Revisions to SC No. 19 — Seller Transportation Aggregation Service to Go into Effect

I.D. No. PSC-19-13-00009-A
Filing Date: 2013-07-18
Effective Date: 2013-07-18

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC allowed a tariff filing by The Brooklyn Union Gas Company d/b/a National Grid proposing revisions to Service Classification (SC) No. 19 — Seller Transportation Aggregation Service to go into effect.

Statutory authority: Public Service Law, sections 65 and 66(12)

Subject: Allowing revisions to SC No. 19 — Seller Transportation Aggregation Service to go into effect.

Purpose: To allow revisions to SC No. 19 — Seller Transportation Aggregation Service to go into effect.

Substance of final rule: The Commission, on July 18, 2013, allowed the tariff filing by The Brooklyn Union Gas Company d/b/a National Grid to remove language under Service Classification No. 19 — Seller Transportation Aggregation Service to go into effect.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0179SA1)

NOTICE OF ADOPTION

Approval for NYSERDA to Modify the Solar Photovoltaic Programs in the Customer-Sited Tier of the RPS

I.D. No. PSC-20-13-00007-A
Filing Date: 2013-07-22
Effective Date: 2013-07-22

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving New York State Research and Development Authority's (NYSERDA) petition authorizing modifications to the Solar Photovoltaic Programs in the Customer-Sited Tier of the Renewable Portfolio Standard Program (RPS).

Statutory authority: Public Service Law, sections 4(1), 5(2) and 66(1)

Subject: Approval for NYSERDA to modify the Solar Photovoltaic Programs in the Customer-Sited Tier of the RPS.

Purpose: To approve NYSERDA to modify the Solar Photovoltaic Programs in the Customer-Sited Tier of the RPS.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving New York State Energy Research and Development Authority's petition to modify the Renewable Portfolio Standard Customer-Sited Tier Solar Photovoltaic Programs, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(03-E-0188SA40)

NOTICE OF ADOPTION

Approving an Exemption of Program Limits in NYSEG's Non-Rate Economic Development Programs

I.D. No. PSC-20-13-00012-A
Filing Date: 2013-07-19
Effective Date: 2013-07-19

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving New York State Electric and Gas Corporation's (NYSEG) petition requesting an exemption under its Non Rate Economic Development Program.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10), (12) and (12-b)

Subject: Approving an exemption of program limits in NYSEG's Non-Rate Economic Development programs.

Purpose: To approve an exemption of program limits in NYSEG's Non-Rate Economic Development programs.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving New York State Electric & Gas Corporation's petition to exempt program limits from its Non-Rate Economic Development program, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-E-0185SA1)

NOTICE OF ADOPTION

Approving Corning's Petition to Develop a Targeted Economic Development Program for Manufacturing Expansion

I.D. No. PSC-20-13-00013-A
Filing Date: 2013-07-19
Effective Date: 2013-07-19

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving Corning Natural Gas Corporation's (Corning) petition for a targeted Economic Development program for the expansion of Corning Incorporated in Steuben County.

Statutory authority: Public Service Law, sections 5(1)(b), 65(1), (2), (3), 66(1), (3), (5), (10), (12) and (12-b)

Subject: Approving Corning's petition to develop a targeted Economic Development program for manufacturing expansion.

Purpose: To approve Corning's petition to develop a targeted Economic Development program for manufacturing expansion.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving Corning Natural Gas Corporation's petition to develop a targeted Economic Development program for the expansion of Corning Incorporated in the Town of Erwin, Steuben County, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-G-0184SA1)

NOTICE OF ADOPTION

Authorizing NYSEG to Issue Up to $74 Million of Long-Term Debt Not Later Than December 31, 2013

I.D. No. PSC-22-13-00008-A
Filing Date: 2013-07-19
Effective Date: 2013-07-19

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: On 7/18/13, the PSC adopted an order approving a petition filed by New York State Electric & Gas Corporation (NYSEG) authorizing the issuance of up to $74 million of long-term securities and to enter into derivative instruments.

Statutory authority: Public Service Law, section 69

Subject: Authorizing NYSEG to issue up to $74 million of Long-Term Debt not later than December 31, 2013.

Purpose: To authorize NYSEG to issue up to $74 million of Long-Term Debt not later than December 31, 2013.

Substance of final rule: The Commission, on July 18, 2013, adopted an order approving a petition authorizing New York State Electric & Gas Corporation to issue up to $74 million of Long-Term Debt not later than December 31, 2013, subject to the terms and conditions set forth in the order.

Final rule as compared with last published rule: No changes.

Text of rule may be obtained from: Deborah Swatling, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2659, email: deborah.swatling@dps.ny.gov An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-M-0200SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Petition for Temporary Waiver of 16 NYCRR Section 96.7(a)(1) and (b)

I.D. No. PSC-32-13-00008-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, two petitions seeking a temporary waiver of 16 NYCRR section 96.7(a)(1) and (b).

Statutory authority: Public Service Law, sections 4, 30-53, 65 and 66

Subject: Petition for temporary waiver of 16 NYCRR section 96.7(a)(1) and (b).

Purpose: To consider the request for temporary waiver of 16 NYCRR section 96.7(a)(1) and (b).

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part the petitions filed by 1) Quadlogic Controls Corporation, AMPS/ELEMCO, Inc., Bay City Metering Company, Incorporated, Leviton Manufacturing Company, Incorporated, and E-Mon, LLC; and, 2) Quadlogic Controls Corporation, AMPS/ELEMCO, Inc., Bay City Metering Company, Incorporated, Leviton Manufacturing Company, Incorporated, E-Mon, LLC and Intech21, Inc. (collectively, the Petitioners) for a temporary waiver of 16 NYCRR § 96.7(a)(1) and § 96.7(b).

The Commission's December 18, 2012 Order required in 16 NYCRR § 96.7(a)(1) compliance with 16 NYCRR Parts 92 and 93 for all submetering products and ancillary equipment used to monitor electric flow to submetered residents installed or replaced by January 1, 2014. The Order also applied the deadline in 16 NYCRR § 96.7(b) for submetering products to institute an annual testing program to analyze a statistically significant sample of the in-service submeters in accordance with the testing procedures and standards required in 16 NYCRR Parts 92 and 93 unless otherwise directed by the Commission.

The Petitioners are seeking temporary waivers to provide time for compliance with the meter standards and implementation of testing procedures.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(11-M-0710SP3)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

To Consider the Definition of ''Misleading or Deceptive Conduct'' in the Commission's Uniform Business Practices

I.D. No. PSC-32-13-00009-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering determining that the definition of ''misleading or deceptive conduct'' in the Commission's Uniform Business Practices includes the use of the name ''NYSEG Solutions'' by Direct Energy Services, LLC.

Statutory authority: Public Service Law, section 5

Subject: To consider the definition of ''misleading or deceptive conduct'' in the Commission's Uniform Business Practices.

Purpose: To consider the definition of ''misleading or deceptive conduct'' in the Commission's Uniform Business Practices.

Substance of proposed rule: The Public Service Commission issued an "Order Instituting Proceeding and to Show Cause" in Case 13-M-0224 regarding the use of the name "NYSEG Solutions" by Direct Energy Services, LLC (Direct), an energy services company (ESCO). The Commission is considering whether the definition of "misleading or deceptive conduct", as that phrase is used in the Commission's Uniform Business Practices (UBP), Section 10.C.4.a includes the use of the name "NYSEG Solutions" by Direct. UBP Section 10.C.4.a prohibits ESCOs from engaging in misleading or deceptive conduct, as defined by, inter alia, "Commission rule, regulation or Order," in the course of an ESCO's marketing activities. The Commission may prohibit Direct from further use of the name "NYSEG Solutions" in its marketing activities. The Commission may also address related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-M-0224SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Permission to Write Off and Eliminate Recordkeeping for Regulatory Reserves for Pensions and Other Post Retirement Benefits

I.D. No. PSC-32-13-00010-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering whether to allow, modify or reject a petition filed by the Frontier Telecommunication Companies seeking to write off and eliminate recordkeeping for Pension and Other Post Retirement Benefits Reserves.

Statutory authority: Public Service Law, section 95(2)

Subject: Permission to write off and eliminate recordkeeping for regulatory reserves for Pensions and Other Post Retirement Benefits.

Purpose: To allow write off and eliminate recordkeeping of Pension and Other Post Retirement Benefits Reserves.

Substance of proposed rule: The Commission is considering whether to allow, reject or modify the Frontier Telecommunication Companies Petition in Case 13-C-0293 to write off Pension and Other Post Retirement Benefits Reserves, and to provide the Frontier Telecommunications Companies (Citizens Telecommunications Company of New York, Inc., Ogden Telephone Company, Frontier Communications of New York, Inc., Frontier Communications of Ausable Valley, Inc., Frontier Communications of Sylvan Lake, Frontier Communications of Seneca Gorham, Frontier Communications of Rochester, Inc.) relief from certain accounting and reporting requirements related to Pension and Other Post Retirement Benefits Reserves.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-C-0293SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

To Bill and Collect Sewer Rents on Behalf of the Village of Port Chester Using Utility Assets and Customer Usage Information

I.D. No. PSC-32-13-00011-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Public Service Commission is considering a joint petition of United Water Westchester Inc. and Village of Port Chester authorizing the use utility assets and customer usage information for non-regulated purpose.

Statutory authority: Public Service Law, sections 8 and 17

Subject: To bill and collect sewer rents on behalf of the Village of Port Chester using utility assets and customer usage information.

Purpose: To determine whether to grant, modify or deny, in whole or in part, the joint petition to bill and collect sewer rent.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a joint petition by United Water Westchester Inc. and Village of Port Chester seeking authorization, pursuant to PSL 8 & 17, to use utility assets, including ratepayer consumption information, for non-regulated purpose of billing and collecting for the sewer rent on behalf of the Village of Port Chester. The Commission shall consider all other related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-W-0312SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

To Consider Whether NYSEG Should be Required to Undertake Actions to Protect Its Name and to Minimize Customer Confusion

I.D. No. PSC-32-13-00012-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering whether to require New York State Electric & Gas Corporation (NYSEG) to take actions to protect its name and to minimize customer confusion in light of the use of the name ''NYSEG Solutions'' by Direct Energy Services, LLC.

Statutory authority: Public Service Law, sections 5, 65, 66, 70 and 110

Subject: To consider whether NYSEG should be required to undertake actions to protect its name and to minimize customer confusion.

Purpose: To consider whether NYSEG should be required to undertake actions to protect its name and to minimize customer confusion.

Substance of proposed rule: The Public Service Commission recently issued an "Order Instituting Proceeding and to Show Cause" (Order) in Case 13-M-0225 in light of the use of the name "NYSEG Solutions" by an energy services company, Direct Energy Services, LLC, which is not affiliated with NYSEG. In that Order, the Commission explained that it is considering confirming that the Commission-adopted Code of Conduct governing NYSEG's relationship with its affiliates does not allow the use of the NYSEG name and logo by non-affiliates of NYSEG, and requiring NYSEG to undertake measures to protect its name and minimize potential customer confusion. The Commission may also address related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: deborah.swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-M-0225SP1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Sithe's Participation with Affiliates in Consolidated Debt Obligations of No More Than $2.175 Billion

I.D. No. PSC-32-13-00013-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: The Commission is considering a petition from Sithe/Independence Power Partners, L.P. (Sithe) requesting approval, under lightened regulation, of participation with affiliates in consolidated debt obligations of no more than $2.175 billion.

Statutory authority: Public Service Law, sections 5(1)(b), (c), 69 and 82

Subject: Sithe's participation with affiliates in consolidated debt obligations of no more than $2.175 billion.

Purpose: Consideration of Sithe's participation with affiliates in consolidated debt obligations of no more than $2.175 billion.

Substance of proposed rule: The Public Service Commission is considering a petition filed on July 12, 2013 by Sithe/Independence Power Partners, L.P. (Sithe) requesting approval, under lightened regulation, of participation with affiliates in consolidated debt obligations of no more than $2.175 billion. The debt will be supported by liens on Sithe's 1060 MW electric and steam cogeneration facility located in Oswego, NY. The Commission may adopt, reject or modify, in whole or in part, the relief proposed and may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website http://www.dps.ny.gov/f96dir.htm. For questions, contact: Deborah Swatling, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2659, email: Deborah.Swatling@dps.ny.gov

Data, views or arguments may be submitted to: Jeffrey C. Cohen, Acting Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 408-1978, email: secretary@dps.ny.gov

Public comment will be received until: 45 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(13-M-0305SP1)

EXHIBIT E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff-Appellant, No. 19-1715

v.

SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York,

Defendant-Appellee

MEMORANDUM OF LAW FOR APPELLEE IN OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

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Dated: August 23, 2019

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PRELIMINARY STATEMENT

New Hope Family Services ("New Hope") is a faith-based agency that operates, among other things, an adoption program in New York. It refuses to place children for adoption with unmarried cohabitating couples and same-sex couples. It thereby operates in violation of a regulation of the New York State Office of Children and Family Services ("OCFS") that prohibits adoption agencies (public and private) from discriminating against applicants for adoption services on the basis of, among other things, sex, sexual orientation, gender identity or expression, and marital status.

In this action under 42 U.S.C. § 1983, New Hope challenges the regulation as applied, arguing that it violates its rights of religion, speech and association under the First Amendment, and also its right to equal protection. After its complaint was dismissed for failure to state a claim, it appealed. And solely on the basis of its First Amendment claims, New

Hope now seeks a preliminary injunction pending appeal that would enjoin OCFS from enforcing its nondiscrimination regulation against it.[1]

The Court should deny the motion because New Hope cannot show a likelihood of success on appeal on any of its First Amendment claims.

BACKGROUND

A. Factual Background

New Hope operates an authorized adoption program that primarily places infants and toddlers up to age two. (Complaint ¶ 76.[2]) It also operates a pregnancy resource center that encourages pregnant women to choose parenting or adoption over abortion. (Complaint ¶¶ 58-62). Some of the birth mothers whose infants New Hope places for adoption come to New Hope through its pregnancy resource center. (Complaint ¶¶ 68, 75.)

In September 2018, OCFS learned that New Hope refuses to provide adoption services to unmarried and same-sex couples, in

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[1] Indeed, in its recently filed merits brief, New Hope has abandoned its equal protection claim.

[2] All of the record documents cited herein are attached as exhibits to New Hope's motion or to the accompanying declaration of Laura Etlinger, where so indicated.

violation of its regulation prohibiting such discrimination. *See* N.Y. Code Rules & Reg., tit. 18, ("18 N.Y.C.R.R.") § 421.3(d). OCFS thus notified New Hope that its practice violated state regulation and was impermissible. (Complaint ¶ 10.) The notice also directed New Hope to file a formal written response identifying whether it intended to come into compliance or to submit a close-out plan for its adoption program. *Id.*

Instead of responding, New Hope commenced this litigation, arguing that the regulation as applied violated its First Amendment rights and its right to equal protection. New Hope also promptly moved for preliminary injunctive relief. OCFS thereupon moved to dismiss the complaint for failure to state a claim and opposed the request for injunctive relief.

On May 16, 2019, the U.S. District Court for the Northern District of New York (D'Agostino, J.), rejected New Hope's constitutional claims, granted OCFS's motion to dismiss, and dismissed the motion for a preliminary injunction as moot. (Decision and Order, at 42.)

New Hope appealed and thereafter sought an agreement from OCFS that would allow it to continue specified adoption activities at least

as long as the appeal remained pending. *See* Etlinger Dec. Ex. A. While OCFS initially considered such an agreement and even proposed specified terms, it ultimately determined that it could not countenance continued discrimination by New Hope, even pending appeal.[3] Accordingly, on August 9, 2019, OCFS sent New Hope a second notice of noncompliance directing New Hope within fifteen days either to confirm that it would come into compliance with the nondiscrimination regulation or to submit a plan to close out its adoption program. (Etlinger Dec. Ex. B.) As New Hope recognizes, OCFS thereafter clarified that a close-out plan would not result in immediate closure of New Hope's program; rather, New Hope was to submit a proposal specifying the steps it intended to take to cease operation of its adoption program within a reasonable time period (typically 90 days or as extended). (Motion Ex. G.)

[3] Contrary to New Hope's claim (Motion at 6), OCFS's motion to remove the appeal from the expedited appeals calendar did not rest on the status of those negotiations. OCFS only referenced those negotiations in connection with its alternative request for an extension to file its brief. *See* Etlinger Dec. Ex. C, ¶ 14.

This emergency motion for a preliminary injunction seeking to enjoin OCFS from enforcing its nondiscrimination regulation pending appeal followed.

B. Statutory and Regulatory Framework

The State has a vital interest in ensuring that prospective adoptive parents provide safe and appropriate homes for adopted children, and that adoptive placements serve each child's best interests. N.Y. Domestic Relations Law ("DRL") § 114(1); *see also* 18 N.Y.C.R.R. 421.2(a). In furtherance of these interests, the State stringently regulates those who provide authorized adoption services while implementing standards and criteria pursuant to which adoption services are provided and placement decisions are made.

Only a public or private "authorized agency" may provide adoption services. N.Y. Soc. Sec. Law ("SSL") § 374(2). An "authorized agency" is an agency organized under New York law with corporate authority to care for children, place out children for adoption, or board out children for foster care. SSL § 371(10). Authorized agencies thus exercise significant authority under New York law in administering adoption services. They accept applications from prospective adoptive parents,

conduct adoption studies regarding applicants' suitability to serve as adoptive parents based on specified factors, *see* 18 N.Y.C.R.R. §§ 421.13, 421.15, 421.16, and applying regulatory standards, approve or disapprove applicants for adoption, *id.* § 421.15(g). The decisions of authorized agencies disapproving applicants are subject to fair-hearing review before OCFS. *See* SSL § 372-e(4). State law also vests authorized agencies with authority to accept surrender of a child from its parents, and thereby transfer legal custody and guardianship of a child to the authorized agency. SSL § 384; 18 N.Y.C.R.R. § 421.6. An authorized agency chooses a prospective adoptive home for the child, making a decision on the basis of the "best interests" of the child, taking into consideration the factors specified in 18 N.Y.C.R.R. § 421.18(d). Guardianship and legal custody of the child remain with the authorized agency during any period of supervised pre-adoptive placement. DRL § 113(1); SSL § 383(2). And critically, the adoption agency's consent is required to complete an adoption for a child the agency has placed. DRL § 113. The district court thus rightly characterized New Hope's adoption activities as involving the "administ[ration] of public services." (Decision and Order, at 42.)

An authorized agency's adoption activities are also subject to significant government oversight. A private adoption agency's certificate of incorporation is subject to OCFS approval, SSL § 460-a(1), and all of its adoption activities are subject to approval, visitation, inspection and supervision by OCFS, DRL § 109; SSL § 371(10).

Thus, under the statutory scheme, an authorized agency wields significant authority and occupies a special status in approving applicants, exercising guardianship and custody of a child, and choosing a safe and appropriate adoptive home.

C. OCFS's Nondiscrimination Regulation

In 2013, OCFS promulgated a series of regulatory amendments designed to eliminate discrimination on the basis of sexual orientation and gender identity in "essential social services." N.Y. State Register (Nov. 6, 2013), at 3.[4] One of these amendments enacted the regulatory provision at issue here prohibiting authorized adoption agencies from "discrimination and harassment against applicants for adoption services

[4] Available at https://docs.dos.ny.gov/info/register/2013/nov6/pdf/rulemaking.pdf.

on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." 18 N.Y.C.R.R. § 421.3(d); *see also* N.Y. Human Rights Law § 296(2)(a) (prohibiting discrimination in the provision of public accommodations on the same bases as OCFS's regulation).

And with respect to the specific protected characteristics that New Hope's discriminatory policy targets—marital status, sex and sexual orientation—New York law has long recognized that none of these characteristics "may alone be determinative in an adoption proceeding." *In re Jacob*, 86 N.Y.2d 651, 663, 667 (1995). Indeed, state law was amended in 2010 to confirm the ability of unmarried and same sex-couples to adopt. *See* N.Y. Laws 2010, c. 509 (*codified at* DRL § 110).

ARGUMENT

THE COURT SHOULD DENY THE MOTION FOR A PRELIMINARY INJUNCTION FOR FAILURE TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

Generally, a party seeking a preliminary injunction must show (1) irreparable harm, and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking the injunctive

relief. *Covino v. Patrissi,* 967 F.2d 73, 76-77 (2d Cir. 1992). Here, however, because New Hope seeks to stay "governmental action taken in the public interest pursuant to a statutory or regulatory scheme," it may not obtain an injunction by meeting that second less rigorous "serious questions" standard. *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) (internal quotation omitted). As the Court has explained, "governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). And New Hope has not demonstrated the requisite likelihood of success on any of its First Amendment claims.

A. New Hope Cannot Demonstrate a Likelihood of Success on its Free-Exercise Claim.

New Hope's religious beliefs do not excuse it from complying with a neutral, generally-applicable regulation, even if the regulation prescribes conduct that its religion proscribes. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990). As the Supreme

Court recently explained, while religious and philosophical objections to specified conduct are protected, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Comm'n,* 138 S. Ct. 1719, 1727 (2018). New Hope acknowledges as much by arguing only that OCFS's regulation is not generally applicable and that its enforcement is motivated by religious animosity. (Motion, at 11-17.) As the district court properly found, New Hope's allegations do not support that claim.

First, the regulation is by its terms general in application. *All* private and public adoption agencies must "prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability." 18 N.Y.C.R.R. § 421.3(d). And contrary to New Hope's argument (Motion, at 12), the statutory and regulatory scheme for adoption contains no exception to OCFS's nondiscrimination regulation. The scheme thus does not "in a selective manner impose burdens only on conduct motivated by religious

belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 543 (1993) (considering targeted nature of prohibition together with secular exception to prohibition as evidence of religious gerrymandering).

The provisions on which New Hope relies (and that it mischaracterizes in any event) create no exceptions to the nondiscrimination regulation. Rather, they allow an agency making a placement determination to consider various factors (including religion) to further the interest in obtaining for each child the most appropriate placement from the pool of approved applicants. For example, state law favors placing a child with adoptive parents of the same faith "when practicable" and honoring a religious preference of the birth mother "when practicable" and in the child's best interest. SSL § 373(2) and (7) (derived from N.Y. Const. art. VI, § 32). In like manner, 18 N.Y.C.R.R. § 421.18(d) allows consideration of "the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet

the needs of the child with such a background" as part of an agency's best-interest placement decision.[5]

As the Third Circuit recently explained in rejecting a challenge similar to New Hope's, there are significant differences between prohibiting agencies from refusing to serve unmarried and same-sex applicants and allowing agencies to consider protected characteristics in placement decisions in order "to find the best fit for each child, taking the whole of that child's life and circumstances into account." *Fulton v. Philadelphia,* 922 F.3d 140, 158 (3d Cir. 2019).

The district court correctly applied the same reasoning here. (Decision and Order, at 24-25).

Moreover, New Hope does not plausibly allege that OCFS's nondiscrimination regulation was motivated by religious hostility. As the

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[5] The two additional provisions New Hope cites simply allow for priorities in recruiting from certain communities or processing applications based on applicants' matching various characteristics of the majority of children available for adoption. *See* 18 N.Y.C.R.R. §§ 431.10(a), 421.18(a)(1). Finally, New Hope cites to the prior version of DRL § 110 for the proposition that state law limits adoption on the basis of marital status. But not only did the Court of Appeals interpret that statute more broadly in *In re Jacob,* 86 N.Y.2d 651, the statute was amended in 2010 to expressly remove references to any such limitation. *See* N.Y. Laws 2010, c. 509.

Court has explained, a litigant challenging the neutrality of a generally applicable and rational law must demonstrate the absence of a neutral, secular basis for the lines the government has drawn. *See Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (2d Cir. 2012). As explained, *supra* at 9, OCFS adopted the challenged regulation as part of a regulatory package that had the neutral and rational purpose of eliminating discrimination on the basis of sexual orientation and gender identity in essential social services, a quintessentially valid public purpose. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995).

Nor do New Hope's remaining allegations give rise to an inference that OCFS applied its regulation in a manner hostile toward religion. New Hope primarily relies on the allegations that (1) OCFS by December 2018 removed from its website the names of several voluntary faith-based agencies authorized at the start of year to make adoption placements, some of which may share New Hope's views on cohabitating and same-sex couples, and (2) OCFS officials made four statements indicating they would not tolerate discriminatory policies.

As to the first allegation, any alleged disparate impact of the regulation on religiously-affiliated agencies flows not from any hostility to religion, but rather from the fact that social services agencies with similarly discriminatory policies often have religious affiliations. After all, there is a long history of social service by religious institutions, as well as a history of opposition by certain religious groups to cohabitation outside of marriage and same-sex marriage. *See, e.g.,* Human Rights Campaign, Religion and Faith: Faith Positions, *available at* https://www.hrc.org/resources/faith-positions. Critically, New Hope has not alleged that OCFS allows agencies to discriminate against unmarried or same-sex couples for secular reasons. As the Third Circuit explained in *Fulton,* "a challenger under the Free Exercise Clause must show that it was treated differently *because of* its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views." *Fulton*, 922 F.3d at 154. And like the plaintiff agencies in *Fulton*, New Hope has failed to allege that discrimination against unmarried or same-sex couples is tolerated when based on secular grounds. As in that case, then, the fact that "[New Hope's] conduct

springs from sincerely held and strongly felt religious beliefs does not imply that [OCFS's] desire to regulate that conduct springs from antipathy to those beliefs." *Id.* at 159.

As to the allegations involving statements by OCFS officials, which New Hope quotes in its complaint but misleadingly describes in its motion papers, they establish only that OCFS does not tolerate discrimination, whatever its source. New Hope alleges four statements for this purpose: (1) a statement by an OCFS spokesperson that "[t]here is no place for providers that choose not to follow the law" (Complaint ¶ 204); (2) a statement that the regulatory amendments that included the nondiscrimination regulation at issue were intended to "eliminate archaic regulatory language" (Complaint ¶ 166); (3) a statement in a policy directive that "OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent" (Complaint ¶ 164); and (4) a staff member's reference to the fact that "[s]ome Christian ministries have decided to compromise and stay open." (Complaint ¶ 192). Contrary to New Hope's argument (Motion, at 16 n.2), these statements do not resemble the statements of the adjudicatory

administrators that the Supreme Court found problematic in *Masterpiece Cakeshop*. *See* 138 S. Ct. at 1729. Unlike those problematic statements, which evinced an "animosity to religion or distrust of its practices," *id.* at 1731, the statements at issue here are neutral toward religion and indicate only that OCFS will not tolerate discriminatory action in contravention of its regulation.

New Hope thus cannot show a likelihood of success on its free-exercise claim.

B. New Hope Cannot Demonstrate a Likelihood of Success on its Free-Speech Claim.

New Hope cannot demonstrate a likelihood of success on its free-speech claim for either of two reasons: First, the regulation does not, as New Hope insists, compel speech, but rather regulates New Hope's conduct—the provision of nondiscriminatory services. Indeed, New Hope has not alleged, and the record does not show, that OCFS will enforce the regulation to restrict any aspect of New Hope's speech, even in connection with its provision of services. Second, even if it the regulation restricted New Hope's speech, it would do so only within the contours of the

provision of regulated public services, and thus would not run afoul of New Hope's free-speech rights.

The Supreme Court has made clear that an equal-access requirement "regulates conduct, not speech." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006) ("*FAIR*") (upholding a law requiring that law schools grant military recruiters equal access to their campuses). Like the law upheld in *FAIR*, the nondiscrimination regulation "affects what [adoption agencies] must *do*—afford equal access to [applicants protected by the law]—not what they may or may not *say*." *Id.* (emphasis in original). Its only function is to ensure that providers of adoption services—like appellant—not exclude qualified prospective adoptive parents from its services.

The Supreme Court has also explained that such equal-access laws do not regulate speech: "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62. Similarly here, New Hope cannot through its discriminatory policy in effect

proclaim, "Single and Married Heterosexual Applicants Only." By prohibiting New Hope from discriminating in its provision of services, OCFS regulates conduct, not speech.

The effect of OCFS's nondiscrimination regulation further confirms that the regulation addresses conduct, not speech. It requires New Hope to exercise its statutory powers in a manner that is neutral toward marital status and sexual orientation. It thus regulates New Hope's *conduct* in approving adoption applicants and making placement decisions; it does not compel New Hope "to disseminate an ideology" with which it disagrees. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713-14 (1977) (individual may not be forced to disseminate state's ideological message on his license plate). The other cases New Hope cites are distinguishable because they similarly involve government-mandated speech. *E.g., Pac. Gas & Elec. Co. v. Pub. Util. Com.*, 475 U.S. 1, 18 (1986) (requiring access to content-based message); *Evergreen Ass'n Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014) (requiring posting of specified information).

To the extent New Hope argues that complying with the regulation would dilute its message, its claim fares no better because any such effect on New Hope's speech is incidental to the regulation of New Hope's

conduct. And "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Natl. Inst. of Family & Life Advocates v Becerra*, 138 S. Ct. 2361, 2373 (2018) (internal quotation omitted); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (rejecting First Amendment challenge to requirement of specific informed-consent language because it regulated speech "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State").

Indeed, New Hope does not allege that OCFS has ever sought to enforce its regulation by restricting New Hope's speech, as opposed to its conduct. Rather, OCFS's enforcement actions have thus far been directed only at New Hope's conduct—its refusal to place children with unmarried and same-sex couples. New Hope alleges no facts—let alone submits with its motion evidence to support any such allegations—suggesting that OCFS intends to regulate New Hope's speech in the absence of discriminatory conduct. Indeed, the district court thought it likely that the regulation did not address such speech. (Decision and Order, at 29-30.) New Hope thus cannot obtain an injunction on the ground that the regulation impermissibly restricts its speech.

Second, and in any event, OCFS's regulation does not in fact purport to restrict New Hope's speech unrelated to its provision of adoption services, and any restriction on New Hope's speech in connection with its delivery of adoption services would flow from the fact that New Hope has "chosen to partner with the government to help provide what is essentially a public service." *Fulton,* 922 F.3d at 161.

Adoption services are provided only by operation of an adoption agency's special status as an authorized agency imbued with statutory authority to wield significant influence over the creation of familial relationships, one of the most powerful legal structures in people's lives. Thus, notwithstanding that New Hope operates as a privately-funded agency, the rule regarding speech restrictions in government programs is instructive. In that context, the Supreme Court has distinguished situations in which the government defines the contours of a government program, which is permissible, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), from those in which the government requires a program participant to espouse the government's message on its "own dime and time," which runs afoul of the free speech clause, *Agency for Intl. Dev. v. Alliance for Open Socy. Intl., Inc.*, 570 U.S. 205, 218-19 (2013). Here, OCFS has

merely defined the contours of the regulated services—applicants may not be rejected and placement decisions may not be made on the basis of protected characteristics. New Hope is not precluded from espousing its beliefs about marriage and family, including by advocating for adoptions by married heterosexual couples, outside the contours of its adoption program. The nondiscrimination regulation thus does not impermissibly regulate New Hope's speech.

C. New Hope Cannot Demonstrate a Likelihood of Success on its First Amendment Association Claim.

New Hope cannot demonstrate a likelihood of success on its claim that the nondiscrimination regulation violates its expressive association rights by requiring it to include unmarried and same-sex couples in its group sessions and recommend such couples as adoptive parents.

In support of its claim, New Hope relies primarily on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). That reliance is misplaced. *Dale* involved the associational rights of the Boy Scouts, whose primary mission is "to instill values in young people." *Id.* at 649. The *Dale* Court held that because the Boy Scouts' members came together specifically for "expressive association," application of a state nondiscrimination law so

as to require the reinstatement of a homosexual scoutmaster violated the Boy Scouts' association rights. *Id.* at 648. In contrast here, New Hope is not open to membership and it was not organized for the purpose of engaging in expressive activities. Its primary mission is to provide adoption services under state law. (*See* Complaint Ex. 2 (certificate of incorporation).) "To the extent that the [nondiscrimination regulation] restricts the activities of charitable or religious groups, it places limits on the non-expressive *conduct* in which they may engage, rather than on their right to associate for the purpose of expressing their views." *United States v. Thompson*, 896 F.3d 155, 165 (2d Cir. 2018).

To be sure, requiring New Hope to provide equal access to its services without regard to marital status or sexual orientation will compel it to associate with unmarried and same-sex couples in the sense of interacting with them for purpose of assisting them to become adoptive parents. But just as the right of association was not infringed by a rule requiring law schools to interact with military recruiters by allowing them on campus and providing the same incidental services provided to other recruiters, *see FAIR*, 126 S. Ct. 1297, New Hope's right of association is not infringed here. That right is infringed only when an

organization is forced to alter its selection of members or constituents, interfering with the critical means by which a group "express[es] those views, and only those views, that it intends to express." *Dale*, 530 U.S. at 648. "Mere incidental burdens on the right to associate do not violate the First Amendment; rather, to be cognizable, the interference with plaintiffs' associational rights must be direct and substantial or significant." *Tabbaa v. Chertoff*, 509 F.3d 89, 101 (2d Cir. 2007) (internal quotation and alteration from original omitted). Here, they are neither.

Although New Hope proclaims a viewpoint about the marital status and sexual orientation of adoptive parents, it does not accept those individuals as members of its organization merely by providing services to them as required by state law. Such transactional association does not directly or substantially interfere with New Hope's associational rights.

Finally, OCFS is not enforcing its nondiscrimination regulation for the very purpose of altering New Hope's expression. OCFS's enforcement merely "assur[es] its citizens equal access to publicly available goods and services"—a goal "which is unrelated to the suppression of expression [and] plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624 (rejecting challenge to application of equal-

access law that required Jaycees to include women as full voting members). Thus, even if the nondiscrimination regulation impacts New Hope's right to expressive association in some way, enforcement of the regulation would not unconstitutionally violate that right.

D. The Balance of Hardships Favor OCFS's Enforcement of the Nondiscrimination Regulation.

Because New Hope cannot establish a likelihood of success on the merits, the Court should deny New Hope's motion on that ground alone. But New Hope is not entitled to a preliminary injunction for the additional reason that the balance of the hardships weighs against it. Although New Hope has proposed interim relief under which it would not accept any new potential parents for adoption services pending appeal, all of the unmarried and same-sex couples who were previously excluded from New Hope's services, as well as those couples who refrained even from seeking services from New Hope on account of its discriminatory policy, would continue to be excluded from the opportunity to adopt any of the children New Hope is in a position to place. The hardship from precluding full enforcement of the nondiscrimination policy is thus not illusory. And the strong public interests that weigh in favor of equal-

access to public services balances the hardships in favor of enforcement. Accordingly, even under the traditional test, the injunction should be denied.

CONCLUSION

The motion seeking a preliminary injunction should be denied.

Dated: Albany, New York
August 23, 2019

Respectfully submitted,

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of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Laura Etlinger, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4600 words exclusive of cover and tables and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Laura Etlinger

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

No. 19-1715

v.

SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York

Defendant-Appellee

DECLARATION OF LAURA ETLINGER IN OPPOSITION TO APPELLENT'S MOTION FOR A PRELIMINARY INJUNCTION

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family ("appellee" or "OCFS").[1]

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[1] At the time this litigation was commenced Sheila Poole served as Acting Commissioner of the Office of Children and Family Services. She was subsequently appointed to serve as Commissioner of the agency.

2. I submit this declaration in opposition to New Hope's motion for a preliminary injunction, seeking to enjoin OCFS from enforcing its nondiscrimination regulation as to New Hope's regulated adoption program. I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and appellant's counsel.

3. I submit the following documents, consisting of copies of correspondence between the parties and their counsel and filed documents, in support of OCFS's opposition to appellant's motion.

a. Exhibit A: Letter from R. Brooks to A. Kerwin, dated July 3, 2019;
b. Exhibit B: Letter from L. Ghartey Ogundimu to K. Jerman, dated August 9, 2019;
c. Exhibit C: OCFS Motion to Remove Appeal from Expedited Appeal Calendar.

Dated: Albany, New York
August 22, 2019

/s/ Laura Etlinger
LAURA ETLINGER
Assistant Solicitor General

Exhibit A

ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE.

July 3, 2019

Via Email & First Class Mail

Adrienne Kerwin, Assistant Attorney General
99 Washington Ave., 2nd Floor
Albany, New York, 12210

Re: *New Hope Family Services, Inc. v. Poole*; NDNY Case No. 5:18-cv-04519

Dear Ms. Kerwin,

Now that we have filed our notice of appeal, I wanted to follow up on our earlier conversation. When we last spoke, you indicated you believed we had a prior "agreement" that New Hope would not take on new clients and that the State would not act to revoke New Hope's authorization to provide adoption and fostering-related services while we litigate the PI motion. Based on my recollection, though, and after looking back at our correspondence, I don't believe we have directly addressed this question before. In your opposition brief dated January 4, 2019, the State represented that "OCFS has no plans to interfere with New Hope's current legal custody of three children, or the placement of those children." (Opp'n Mem. at 11 n. 11.) But the State has not given any assurances regarding New Hope's work with its adoptive families, nor with respect to birthmothers who specifically request New Hope's assistance while the PI litigation is pending.

As New Hope detailed in its preliminary injunction papers, if it is unable to respond to these requests and commitments, New Hope and the individuals it serves will suffer harm that will be difficult or impossible to remedy. Obviously, the district court dismissed New Hope's claim and therefore did not consider New Hope's request for a preliminary injunction on the merits. We believe the district court erred and that this error stands a reasonable chance of being reversed on appeal. If we prevail on appeal, New Hope's request for a preliminary injunction will be renewed.

All that will proceed in an orderly manner. In the meantime, as I suggested when we spoke, if possible, we would like to avoid needlessly burdening your office, our office and the courts with briefing and deciding emergency motions for temporary protection pending appeal of the recent ruling. If the State will agree not to revoke New Hope's authorization until either the dismissal is affirmed *or* a substantive ruling on New Hope's preliminary injunction motion has been entered,

there will be no need for collateral litigation over maintaining the status quo during these appellate proceedings.

Please let me know your thoughts. In the meantime, I hope you enjoy a pleasant Fourth of July holiday.

Best Regards,

s/ Roger G. Brooks
Roger Brooks
Attorney for Plaintiff

Exhibit B

9171 9690 0935 0054 4740 21

NEW YORK STATE | Office of Children and Family Services

ANDREW M. CUOMO
Governor

SHEILA J. POOLE
Commissioner

August 9, 2019

Kathy Jerman
Executive Director
New Hope Family Services
3519 James Street
Syracuse, NY 13206

Dear Ms. Jerman:

The New York State Office of Children and Family Services (OCFS) is writing in furtherance of its letter, dated October 16, 2018, which informed New Hope Family Services (New Hope) of its determination that New Hope's policy precluding the placement of children with same sex couples or unmarried cohabitating couples was discriminatory and impermissible. That letter directed New Hope to submit a formal written response identifying whether it was going to revise its policy and practices to come into compliance with 18 NYCRR 421.3, or if it intended to submit a close-out plan for its adoption program.

By decision dated May 16, 2019, United States District Court Judge Mae D'Agostino determined that "OCFS stands on firm ground in requiring authorized agencies to abide by New York's non-discrimination policies when administering public services" and found that New Hope had failed to plausibly state a claim alleging an infringement of its right to free exercise of religion. As stated previously, OCFS cannot continue to approve New Hope's adoption program if it does not bring its policy and practices into compliance with the above-cited regulation.

Accordingly, please submit confirmation that New Hope will come into compliance with the regulation, or a plan to close New Hope's adoption program, within 15 calendar days of receipt of this letter. If New Hope chooses to close its adoption program, OCFS will provide all necessary guidance and assistance to ensure minimal disruption to children and families receiving adoption services.

Sincerely yours,

Lisa Ghartey Ogundimu
Deputy Commissioner
Child Welfare and Community Services

cc: Roger G. Brooks, Esq.

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC.

Plaintiff-Appellant,

No. 19-1715

v.

SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York

Defendant-Appellee

DECLARATION OF LAURA ETLINGER IN SUPPORT OF MOTION TO REMOVE THE APPEAL FROM THE EXPEDITED APPEAL CALENDAR

I, Laura Etlinger, a lawyer duly admitted to the courts of the State of New York and this Court, do hereby declare under penalty of perjury as follows:

1. I am an Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York. I represent appellee Sheila J. Poole, in her official capacity as Commissioner for the New York State Office of Children and Family ("appellee" or "OCFS").[1]

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[1] At the time this litigation was commenced Sheila Poole served as Acting Commissioner of the Office of Children and Family Services. She

2. I submit this declaration in support of appellee's motion pursuant to Local Rule 31.2(b)(2) to remove the appeal from the Expediated Appeal Calendar ("XAC") or, in the alternative, to extend the time for the filing of appellee's brief in this matter. I make this declaration based on my review of the records in this appeal and my correspondence and conversations with OCFS staff and appellant's counsel.

3. As explained below, this appeal is not well-suited to expedited review for two reasons: (1) the appeal involves constitutional issues that implicate important public policies and merit sufficient time for briefing, argument, and decision, and (2) the District Court dismissed the complaint following a full substantive review of the merits of appellant's constitutional claims, which is not the type of dismissal for which the XAC was developed.

4. Appellant New Hope Family Services ("New Hope") is a faith-based not-for-profit agency that operates, among other things, an adoption program in New York State. New Hope commenced this action pursuant to 42 U.S.C. § 1983 to challenge an OCFS regulation that

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was subsequently appointed to serve as Commissioner of the agency.

prohibits public and private adoption agencies from discriminating against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability. *See* N.Y. Code Rules & Reg., tit. 18, ("18 N.Y.C.R.R.") § 421.3(d). Dist. Ct. No. 18-cv-01419, ECF No. 1.[2] New Hope maintains a policy of not placing children with adoptive couples who are unmarried or of the same sex. Dist. Ct. No. 18-cv-01419, ECF No. 1, at 24. Upon learning of this policy during an on-site review, OCFS advised New Hope that if it failed to bring its policies into compliance with the non-discrimination regulation, OCFS would be unable to approve continuation of New Hope's adoption program. Dist. Ct. No. 18-cv-01419, ECF No. 1-7, at 3. New Hope then commenced this action, seeking a permanent injunction prohibiting enforcement of the non-discrimination regulation to its adoption program, claiming the regulation violates its free exercise, free speech, and equal protection rights and constitutes an unconstitutional condition. Dist. Ct. No. 18-cv-

[2] Citations to the record are to documents filed with the District Court in Docket No. 18-cv-01419 or with this Court in Docket No. 19-1715. Documents are referred to by document number and page in the courts' electronic court filing ("ECF") systems.

01419, ECF No. 1, at 24, 40, 44, 46, 48.

5. Immediately after commencing this action, New Hope filed a motion for a preliminary injunction. Dist. Ct. No. 18-cv-01419, ECF No.15. Shortly thereafter, OCFS moved to dismiss the complaint for failure to state a claim on the ground that the neutral, generally-applicable non-discrimination regulation could be constitutionally applied to New Hope's adoption program as a matter of law. Dist. Ct. No. 18-cv-01419, ECF Nos. 34, 34-1. In a thorough, 42-page decision, the District Court for the Northern District of New York (D'Agostino, J.) rejected all New Hope's constitutional claims on the merits, holding that the OCFS non-discrimination regulation could be constitutionally applied to New Hope's adoption program. The court accordingly denied the motion for a preliminary injunction and dismissed the complaint. Dist. Ct. No. 18-cv-01419, ECF No.38.

6. New Hope filed its notice of appeal on June 10, 2019. Dist. Ct. No. 18-cv-01419, ECF No. 40. On July 11, 2019, this Court issued a Notice of Expedited Appeal, placing the appeal on the Court's XAC, and directing that New Hope's opening brief be due by August 15, 2019 and appellee OCFS's brief be due by September 19, 2019. Second Cir. No.

19-1715, ECF No. 34.

7. There is good cause to remove this appeal from the XAC. First, the constitutional issue presented—whether a non-discrimination regulation may be constitutionally applied to a not-for-profit agency engaged in the regulated, public service of facilitating adoptions—involves important matters of public policy. The importance of this issue is demonstrated by the fact that fifteen amici briefs were filed in connection with a recent Third Circuit appeal involving an analogous issue—whether a similar non-discrimination policy may be constitutionally applied to a foster-care program operated by a faith-based not-for-profit agency. *See Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019). In addition, the plaintiff not-for-profit agency in that case has recently filed a petition for certiorari seeking review in the U.S. Supreme Court of the Third Circuit's decision rejecting its constitutional challenges to application of the non-discrimination policy. *See Fulton v. City of Philadelphia*, Supreme Court Docket No. 19-123 (pet. for cert. filed July 22, 2019).

8. Although plaintiff's appeal is from a judgment dismissing the complaint for failure to state a claim, that dismissal was based on a

full review of the merits of appellant's constitutional claims and application of substantive law, rather than a review of whether the allegations of the complaint satisfy pleading standards. Thus, the appeal does not involve the type of dismissal for which the XAC was designed. *See* Hon. Jon O. Newman, *Report: The Second Circuit's Expedited Appeals* 80 Brook. L. Rev. 429, 429-30 (2015) (stating that the Court's XAC was instituted in the aftermath of Supreme Court decisions requiring a more rigorous pleading standard so that cases in which the new pleading standards were deemed to have been improperly applied could be returned more quickly to the district court).

9. For these reasons, OCFS respectfully submits that there is good cause to remove this appeal from the XAC in order to allow sufficient time for the important constitutional issues presented by this appeal to be briefed, argued, and decided.

10. In the alternative, if the appeal is not removed from the XAC, appellee OCFS respectfully requests that it be granted a 30-day extension of the deadline for its brief, to October 21, 2019.

11. An extension is needed because it would be extremely difficult for my office to adequately research the issues and prepare a

brief within the timeframe contemplated under the current briefing schedule.

12. My own schedule is especially busy from now through mid-September, when among other work I will be preparing four other appellate briefs and presenting oral arguments in three appeals, including one in this Circuit and one in the New York Court of Appeals. Moreover, reassigning this matter to someone else is not feasible, as my office is currently short three attorneys due to extended family leaves and a recent departure.

13. In addition, the brief in this matter will require review by both a deputy solicitor general and the New York Solicitor General. The current expedited briefing schedule does not allow sufficient time for the necessary review process to take place.

14. Finally, New Hope has been able to continue to engage in some adoption service activities, even though its motion for a preliminary injunction was denied. Indeed, during the pendency of the litigation in District Court, OCFS permitted New Hope to continue to engage in certain of its adoption program services. *See* Dist. Ct. No. 18-cv-01419, ECF No. 32, at 4. And the parties are currently negotiating a

more formal partial stay of OCFS's enforcement activities, which would allow New Hope to engage in specified adoption activities during the pendency of this appeal.

15. Accordingly, for all of these reasons, OCFS respectfully requests that the Court remove this appeal from the XAC or, in the alternative, that the Court grant OCFS a 30-day extension to file its brief, to October 21, 2019.

Dated: Albany, New York
July 29, 2019

/s/ Laura Etlinger
LAURA ETLINGER
Assistant Solicitor General

EXHIBIT F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

vs.

SHEILA J. POOLE, In her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York,

Defendant.

CASE NO. 18-CV-1419

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. MAE A. D'AGOSTINO
TUESDAY, FEBRUARY 19, 2019
ALBANY, NEW YORK

FOR THE PLAINTIFF:
ALLIANCE DEFENDING FREEDOM
By: ROGER GREENWOOD BROOKS, ESQ., DAVID A. CORTMAN, ESQ., and JEANA HALLOCK, ESQ.
15100 N 90th Street
Scottsdale, Arizona 85260

FOR THE DEFENDANT:
OFFICE OF THE ATTORNEY GENERAL
By: ADRIENNE J. KERWIN, ESQ.
The Capitol
Albany, New York 12224

(Open court, 10:53 a.m.)

THE CLERK: Today is Tuesday, February 19, 2019. The time is 10:54 AM. The case is New Hope Family Services, Incorporated versus Sheila J. Poole in her capacity as acting commissioner for the Office of Children and Family Services for the State of New York, case No. 18-CV-1419. We're here today for oral argument. May we have appearances for the record, please.

MR. BROOKS: Roger Brooks for plaintiff New Hope Family Services.

MR. CORTMAN: David Cortman, Your Honor.

MS. HALLOCK: Jeana Hallock.

THE COURT: Good morning.

MS. KERWIN: Good morning. Adrienne Kerwin for Acting Commissioner Poole.

THE COURT: Good morning to you.

I'm going to begin this morning with argument on behalf of the plaintiff on the motion.

MR. BROOKS: Your Honor, thank you. Again Roger Brooks. And counsel did confer before, and our expectation -- I hope it's acceptable to the Court -- is that there are two motions of course with opposite burdens, but we'll argue them together rather than trying to break that out.

THE COURT: I think that's probably the most efficient way to do it.

MR. BROOKS: And there was also an indication from your chambers that you were expecting -- and I don't know whether you're expecting exactly or about half an hour of argument per side. We just want to make sure.

THE COURT: I planned for 30 minutes. If I have questions that take me beyond 30 minutes, then we'll do that, but the plan is 30 minutes each side.

MR. BROOKS: Then we will make that happen, Your Honor.

Your Honor, at any given time, New York has more than 4,000 children who are in need of adoption and permanent loving homes, and fewer than 2,000 of those are adopted each year. Since it was founded more than half a century of ago, New Hope has found homes for over a thousand newborn and infant children in this state. That's who it serves. And the people of New Hope are motivated by their faith, and they view their ministry through this organization as living out their faith in service to infants and birth mothers.

THE COURT: New Hope sees its mission, if I'm correct, as a mission to offer orphans and widows assistance in their time of distress. Would that be correct?

MR. BROOKS: Your Honor, I'd say that's a fair statement of historic context. In the modern world, many of these women who are unable to care for their children are not widows, but they are most commonly not married.

THE COURT: What about orphans and what about making the pool of adoptive parents larger as opposed to smaller by allowing gay and lesbian adoptions?

MR. BROOKS: Well, Your Honor, let me speak for a moment to the legal history and then address the factual question, if I may. As Your Honor knows, in 1995 the In Re Jacob case, the Court of Appeals of this state changed what had been the law. Before that, a family court couldn't approve an adoption by an unwed couple or same sex couple.

THE COURT: I'm aware of the history.

MR. BROOKS: Fine. So Jacobs permitted that and expands the pool. What New Hope does is devote its mission energies, all of its work is funded by private contributions and fees from adoptive parents, nothing from the state.

THE COURT: No public funds whatsoever?

MR. BROOKS: No public funds whatsoever, exactly.

THE COURT: I have even a broader question. When New Hope is placing a child with a family, you're doing that in the best interest of the child, correct?

MR. BROOKS: That is always their goal.

THE COURT: That's the standard, right?

MR. BROOKS: Yes, it is.

THE COURT: Do you ever ask the birth parents if they have any objection to a child being placed with a gay and lesbian couple, or does that never come up?

MR. BROOKS: Well, I believe -- and Your Honor, given the state of the case, I need to confine myself to what I know from the complaint and the affidavits. That's largely the limit of my knowledge. The answer is in every case working with a birth mother, there's extensive discussion about what that mother wants for her child in terms of family.

THE COURT: And under New York law, if a birth parent said to you, "My Christian faith is extremely important. I want my child placed with a Christian family or my ethnicity is very important. Can you help place the child in a particular group?" You can legally honor that under existing New York law, correct?

MR. BROOKS: Always subject, as I read the law, to the requirement of the best interest of the child. Yes, Your Honor.

THE COURT: So could there be individuals utilizing New Hope who might not object to their child being placed with a Christian lesbian or Christian gay couple?

MR. BROOKS: Well, obviously, Your Honor, the spectrum of faith within Christianity or Judaism, there's wide differences of views within those faiths, as Your Honor I'm sure is aware. Could such a thing happen? You and I could sit here and say it could happen, but there's nothing in the record to suggest such a request has ever been made by a birth mother to New Hope.

THE COURT: I mean if you have a child who is a hard-to-place child in any way at all -- just for example,

learning disabilities, cognitive problems, physical handicaps -- and there's a willing, able, adoptive family that happens to be gay or lesbian, is it your position that it's better to keep that child in a foster home or in some other custody rather than to place the child with a gay or lesbian couple?

MR. BROOKS: Your Honor, our position is that the factual background of the position is perhaps because of its outreach into faith communities by recruiting parents, New Hope has never failed to find multiple families that it was prepared to offer that it believes were consistent with the best interest of children. So it does place hard-to-place children. It's placing infants and newborns up to about two years by the nature of the pool it works with. So some of the issues that we deal with older children are probably not detectable at that stage.

But there's no allegation that New Hope has ever made a placement -- there's nothing from the state. You'll see this in the papers. There's no suggestion that New Hope has ever made a placement that was not consistent with the best interest of the child, nor is there any allegation that for reasons such as you suggest, New Hope hasn't been able to quickly place a child once it became eligible for adoption.

THE COURT: Another question that I have is that generally speaking in the adoption process, isn't it the independent home study that determines whether or not anyone is capable of adopting? You have to have a home study.

MR. BROOKS: You certainly do have to have a home study. That's part of the service they do.

THE COURT: New Hope does its own home studies, correct?

MR. BROOKS: It does.

THE COURT: But what if a gay and/or lesbian couple came to New Hope? They had had a home study done by an independent social worker or independent psychologist, and that home study certified that they could be very appropriate parents? Is it still free speech if you were to adopt out to that couple when it wasn't New Hope that said that they would be appropriate parents? It was an independent home study. Where is the speech there? Where is the speech in trying to place children in appropriate, loving homes?

MR. BROOKS: Well, let me break that out, Your Honor. The specific fact situation you suggest where somebody else has done the home study and the adoption agency in some sense approves the adoption is not one that I'm familiar with and not one that arises in any of the facts that are alleged in the complaint or raised in affidavit by the state. I really can't speak to that situation.

THE COURT: Would New Hope ever endeavor to do a home study for a gay and/or lesbian couple?

MR. BROOKS: I believe the answer to that, Your Honor, is -- and this is the core of the allegation, that New Hope

feels compelled by its faith to place children in a context that its faith teaches, given their beliefs about family, about marriage, about children, is in the best interest of the child. New Hope doesn't share New York State's belief that those sorts of families are equally in the best interest in the child.

So if somebody approaches New Hope asking for that, a situation would require New Hope to engage in extensive counseling-relating speech with the birth mothers about this potential adopting family. With the adopting family, there's extensive counseling. These are detailed in the affidavits, and I could give Your Honor cites. They're in the briefs as well.

THE COURT: I know it's hypothetical, but if a home study was done on a gay and/or lesbian couple and the home study, which is very exhaustive, as you know, sets forth the opinion that the gay and/or lesbian couple would provide excellent parenting to an orphan, what you're saying is that under no circumstances would you accept that because you're saying that it goes against your sincerely held religious belief, correct?

MR. BROOKS: Your Honor, New Hope would not perform that home study because it would be to put them heading towards a conclusion. It would be wasting the time of the parents.

THE COURT: You don't want to get to that conclusion that the gay or the lesbian parents could be very good parents. You don't want to risk doing the home study, right?

MR. BROOKS: Your Honor, I too -- it's been a long time, but I've been through the process myself, and I'm familiar with how extensive it is. New Hope's faith teaches that the right environment for children and for infants, newborns, kids they're placing, what's in the best interest of those children is the types of families that New Hope succeeds time and again in recruiting.

The thing I would like to emphasize is New Hope's efforts in this area are all additive. That is, the state does what it can do. Other private agencies do what they can do, and all those options are available for anybody who wants to adopt, for anybody who wants to place their child. New Hope devotes private efforts, private resources, private contributions to placing still more children, and there's no contention that any of those placements have been contrary to the best interest of the child.

THE COURT: I'm not suggesting it has been, and I accept from reading your papers that New Hope is attempting and has placed children in homes that you think are appropriate. But if a gay and/or lesbian couple comes to New Hope and says, "Will you do a home study on us," which is a precursor to moving forward the process, your answer would be no. It's against our sincerely held religious briefs, correct?

MR. BROOKS: That's correct, Your Honor.

THE COURT: And that you would counsel them that they

could go someplace else, correct?

MR. BROOKS: That is correct.

THE COURT: It sounds like separate but equal to me, and that's very troubling to me. How does it sound to you? You can't adopt here, but you can go someplace else and adopt.

MR. BROOKS: Your Honor, let me give you an analogy. The Supreme Court in the Obergefell decision -- and this state I believe reached this conclusion earlier, but in the Obergefell decision, the Supreme Court opened up the possibility of marriage between same sex couples. That's legal in every state of this nation now.

What the state is attempting to do here, what the state is attempting to require of New Hope here would be the equivalent of saying to the Catholic church or any church that because it's legal for same sex couples to be married, then any clergyman who is authorized by the State of New York to perform legally valid marriages must perform same sex marriages.

That's not the law, and the Supreme Court said in Masterpiece Cakeshop case that that type of order to a religious organization -- you must perform same sex marriages -- could not stand in the face of the First Amendment rights of both free speech and free exercise.

So there's a very large difference, Your Honor, between permission, which is clearly granted here, and many couples, unmarried couples and same sex couples in this state

are adopting. There's a very large gap between permission and a command to a religious organization to act in a way and to speak in a way they believe to be wrong and false.

THE COURT: But that Masterpiece Cakeshop Supreme Court case, which I've read multiple times --

MR. BROOKS: I'm sure you have, Your Honor.

THE COURT: -- really in many way hinges on the manner in which Masterpiece Cakeshop was treated by the commission, and there was language in that decision talking about the palpably improper comments of the commission and how they, you know, really disparaged the cake shop.

And here, I'm looking at the applicable section of the law, 421.3(d) I believe of NYCRR, 18 NYCRR. It prohibits discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, sex, age, sexual orientation, gender identity or expression, marital status, religion, or disability.

I don't see any animus toward Christians here. I don't see things that appeared on the record in the Masterpiece Cake case. I see this as really a very content neutral regulation. And so I don't think that the Supreme Court wedding cake case is really instructive on what I must do here.

MR. BROOKS: Your Honor, the holding of the Supreme Court in the Masterpiece Cake, you've correctly described the context. It's in a discussion in which the Court has explained

principles of free exercise. They give as an example of something the state could not do to compel a clergyman to perform same sex marriages. And it seems to me that the analogy between compelling a religious entity, a church to perform same sex marriages and compelling a religious ministry to infants and birth mothers to facilitate placement in a family environment they believe is not in the best interest of children is really -- they're closely analogous.

Now, you've said -- if I may, you raise the question of whether this law is content and viewpoint neutral. I can address that if you would like.

THE COURT: I read your papers. I know you believe it isn't, but go ahead. Tell me why.

MR. BROOKS: I would like to break that out because as you know, if we're talking from the free speech side, that's where we kind of engage most directly with that. We believe the law is invalid under both free speech and free exercise principles, but let me address this.

You know that it's a requirement that we're going to have to get this law through strict scrutiny unless it's content neutral. You've pointed to the text of the law and said, well, it looks neutral to me.

THE COURT: It seems to apply to everybody equally. I don't see anything in there that says that we believe Christianity is not an appropriate faith and therefore we're

going to go after you. I mean I don't see anything -- I simplified it, but I don't see anything like that.

MR. BROOKS: Let me stick with the speech principle first, Your Honor. The fact that a law applies its requirements to everyone does not make it content neutral within the meaning of the law. We pointed that out. If that were the case, Your Honor, then a law that says everyone must salute the flag would be neutral. It wouldn't inquire into anybody's beliefs. It wouldn't focus on the fact that there are conscientious objecting denominations that don't want to salute the flag.

It would on its face be neutral, yet in the midst of World War II, the Supreme Court said no. You can't pass a law of general applicability that requires people to speak something they believe that is contrary to conscience, they don't want to say. That's the Barnette case. You know it well. So the fact that you look at the law on its face, it looks content neutral that applies equally to everybody, doesn't answer the question.

It's also the case that the state here has said this is content neutral because it has a neutral goal of fighting discrimination, of ending discrimination.

THE COURT: And that's a good goal, isn't it? Isn't that an important societal goal to prevent and to outlaw discrimination?

MR. BROOKS: Well, those are two different questions, Your Honor.

THE COURT: Maybe you can answer both of them.

MR. BROOKS: I'm going to try to do that. One is: Is it a legitimate and appropriate goal for the state to combat discrimination? And of course, at different times and different people have different views of what's appropriate judgment distinction and what's discrimination, but broadly speaking, the answer to your question is yes, and the state is free to take all sorts of actions to teach against, to act against discrimination.

Now, is it appropriate to outlaw discrimination? Well, the answer to that is when it runs into First Amendment principles, often the answer to that is not. And I would call your attention particularly to the Supreme Court's case in Hurley, which again is surprisingly closely analogous. There, the state Massachusetts asserted that the goal of their public accommodation law was "to ensure that discrimination does not occur." And the Supreme Court there said the speech clause has no more certain antithesis than the concept of censoring or compelling speech "to produce a society free of biases." And they struck it, and they said no. You can't require that parade organizers to let in a group that's representing a position that the parade organizers don't want to sponsor.

And so what may be a legitimate policy goal for the state to advocate in other ways, when it intersects First Amendment principles, the Supreme Court said in Hurley that this

goal which is otherwise meritorious perhaps of combatting discrimination "was a decidedly fatal objection." Just the opposite of a compelling objection, a decidedly fatal objection.

So the difference between what the state can legitimately pursue and what the state can outlaw, what the state can compel, what the state can compel speech that a religious organization or anybody of conscience disagrees with are two very different questions, and our First Amendment law both with regard to speech and with regard to free exercise is all about frankly letting people say things that are generally disapproved and letting people do things that broader society doesn't approve of because if that's not the situation, you don't find yourself in court.

THE COURT: Why don't you move on to your equal protection argument for me.

MR. BROOKS: Well, Your Honor, we did not make a preliminary injunction request based on equal protection argument.

THE COURT: Right.

MR. BROOKS: In the motion to dismiss, I will tick through some of the allegations we believe are sufficient to defeat the motion to dismiss. That is, the state says in their final papers that we admitted that we were not making a class of one claim. And I guess that's true because we never suggested that we were.

What we suggested is that we've made a kind of classic protected class claim. The OCFS has taken action that we believe and we've alleged has the particular effect of shutting down agencies who hold what could be called traditional faith-based beliefs concerning marriage, family, and the best interest of children. And the state seems to be of the view that as long as you shut down everybody who holds those beliefs, then there's no equal protection problem because you're applying it equally. Your Honor, that, we believe is not what equal protection requires. You've forgotten the relevant variable, that is similarly, equivalently placed except for the point of controversy.

And it's undisputed. The allegations are clear that New Hope has only been commended for the quality of its service except in this one respect, and yet it -- and we believe and have alleged based on information and belief other similarly situated organizations are being shut down solely because they won't toe the state's line on this one point of speech and belief.

So we've cited the American Atheist case from the Second Circuit just a few years ago which highlights discrimination based on the protected class of a religious belief defining the protected class.

We've alleged arbitrary enforcement amounting to discrimination against that protected class when you have a

structure that says, look, we're against discrimination, but you can consider race and you can consider religion subject to the best interest of the parent or as part of the best interest of the parent. The only thing we say you may not under any consideration consider is this one thing that is probably in New York today distinctive only of a limited number of faith-based organizations.

It's a rather unique thing, Your Honor. You can parse through the statute and regulatory structure, and you will see guarded permissions to consider race, to consider ethnicity, to consider religion as part of the best interest. And then you hit this one thing where the state says, but you may not consider. We deem it irrelevant. So many things about the family structure are relevant. We deem it irrelevant whether the family is married, whether the parents are married. You may not consider it.

We believe that we've sufficiently alleged -- we believe the discovery will show more that that has been promulgated in that form precisely because OCFS detects that there are religious organizations that hold to what I've called traditional views of the importance of marriage and family with a mother and father and it has described those beliefs as "archaic," that it's hostile to them, and it's trying to shut them down for that reason. We think that states an equal protection violation.

THE COURT: All right. Is there anything else that you want to bring to my attention before you conclude?

MR. BROOKS: Your Honor, there is. I would like to if I may speak of the question that arises in the free exercise realm. If we've identified -- we need to identify a compelling interest and demonstrate that not only is it a noble interest, a commendable interest, but it's actually furthered by the statute. And in it, as applied challenge, which we've made here as applied to New Hope, the Gonzalez versus O Centro Espirita -- it goes on -- case says the state actually has a burden to demonstrate that making an exception for this party in this case would harm the interest.

Well, the state advances an interest of fighting discrimination, and I've talked about that, but I think always what it really comes back to, the right interest here, the interest that OCFS is commissioned with, the highest interest that we need to be thinking about when there is an adoption situation going on is the interest of the children of the state who need homes.

THE COURT: That's true, and statistically right now, I may be -- I don't know if these are the most up to date numbers, but I think that 8 to 10 million children are being raised by, you know, gay and lesbian couples, and your position is that that's wrong. It's against our religious beliefs, and I keep coming back to the fact that it's usually an independent

home study that decides whether or not somebody could be suitable. Your litmus test is if it's not a marriage between a man and a woman, and if you're not truly -- I take it you would adopt out, New Hope, to a single gay person or a single lesbian person if they were truly single; is that correct?

MR. BROOKS: Your Honor, there is nothing about that in the record, but my understanding is the faith convictions at issue here have to do with family structure, not with anybody's identity.

THE COURT: I know, but if you would be willing to place a child with a truly single gay person or a truly single lesbian person, but not gays or lesbians in a marriage, it seems contradictory.

MR. BROOKS: Your Honor, different people's faith beliefs often seem nonsensical to others. That's the nature of faith. That's why we have the First Amendment.

THE COURT: I'm not criticizing your faith beliefs. I'm getting back to your mission, which is to take care of orphans.

MR. BROOKS: To help children.

THE COURT: Orphans and children and infants and toddlers and everybody else that is placed for adoption. And I can't help -- but I take a look at the regulation, which is a regulation that New York adopted in order to prohibit discrimination. And I keep coming back to the fact that New

Hope has a litmus test, and that litmus test is we are not going to place children with gay and lesbian couples because it's against I believe your sincerely held religious beliefs that marriage is between one man and one woman. And yet you will adopt out to a single gay person or a single lesbian person. And by your conduct, you're excluding a significant number of people who would be available to adopt.

MR. BROOKS: Frankly, Your Honor, probably the larger number of people who New Hope's beliefs about family prevented from assisting towards adoption are unmarried couples. This isn't really about -- this is about their belief, faith taught belief about the proper structure of relationships for children, and they are what they are.

One of the things the Court is very clear on is in a free exercise case, you don't parse the reasonableness. You can in some cases ask about the sincerity. I don't think there's any dispute about sincerity here, but let me cut to the chase because you said a few moments ago the key thing is getting children into good homes. For purposes of the preliminary injunction, for purposes of this lawsuit, let me emphasize two things.

First, shutting down New Hope, which is what the state wants to do right away, will not increase the adoption possibilities for any child. It cannot increase the adoption possibilities for any would-be parents.

THE COURT: Do you know how many families are currently beyond the home study and awaiting placement of an infant with New Hope right now?

MR. BROOKS: I don't think a definitive number is in the record. I think the answer is less than ten fully completed families. And part of the reason we need a preliminary injunction is that's always the pipe line.

One of the things, one point I would like to make is shutting down New Hope doesn't increase any child or any potential adoptive parent's options and access to adoption. Keeping them open doesn't deprive anybody of any options they have otherwise. There's no argument to the contrary.

THE COURT: The state would say we don't want to shut you down. We just want to make sure you're not discriminating. You know what I mean?

If you can consider religion and you can consider ethnicity, why is it that you can't continue to operate and say to a birth mother or a birth mother or birth mother and father, "We have a home study from a gay couple. The social worker indicates that they have everything that you could ask in terms of being great parents." And why couldn't you ask them and have them say either, "Okay. They seem great. We'll do it," or, "No. No. We're not going that way. We want a heterosexual. We want a one man and a one woman." I mean what are you afraid of?

MR. BROOKS: Your Honor, New Hope always does its own studies. That's just how they operate and have operated for decades as far as I understand. So the scenario you suggest --

THE COURT: It will never happen.

MR. BROOKS: What they do do and commonly as I think you also understand, one of their frequent, by no means only sources of infants is their pregnancy resource center. They're helping women who are in unplanned pregnancies, and it's a whole counseling relationship about what that woman wants for her child, and New Hope has convictions about what's going to be good for that child. They can't lie about those convictions. They can't say, "We don't think it's important that your child be raised in a family with a father and mother," because they do think it's important.

They -- and I'm an attorney, Your Honor. I'm trying my best to characterize their beliefs, and I hope I'm getting it accurately. They believe that that God-ordered structure is best for children.

So the other thing I want to emphasize that's in the pleadings and it's in the affidavit we've submitted in support of the preliminary injunction, speaking broadly, having faith-based adoption agencies in this state, whether it's Jewish ones reaching into the Jewish community, whether it's evangelicals reaching into the evangelical community, whether it's Catholics reaching into the Catholic community, it brings

in adoptive parents who might not otherwise be adopting.

We have declarations from two parents, both of whom have adopted, say they would consider adopting again, that they've adopted with New Hope in the past. They would consider adopting again, but not if they couldn't find an agency that shared their faith beliefs about family.

THE COURT: I've read those, but the truth of the matter is that when parents are -- when people are looking to adopt, I think that there is a lot more than faith that enters into it. You know, many people are looking at wanting to get infants. Many people have a cutoff age after which they do not want to adopt. I read those affidavits, and I understand that.

But I just get back to the fact that no gay and/or lesbian couple would ever have a shot with New Hope because you would just say, no, I'm not going to do the home study. Many gays and lesbians have had -- married couples have had home studies by other agencies. They've been determined to be excellent candidates for parenthood, and they've gone on to adopt, but with your agency, it's just a nonstarter.

MR. BROOKS: Your Honor, as you well know, there are many agencies that will serve those people. What the state said in its final papers, on page 7, New York State permits faith-based groups to provide adoption services in an effort to provide as many service options as possible to families surrendering children for adoption and those seeking to adopt,

as many service options as possible. That's the commendable spirit. That's the right spirit. It's the opposite of what the state is trying to do here.

THE COURT: I think it's the opposite of what you're trying to do.

MR. BROOKS: Well, New Hope has faith convictions. It finds families for children time and again without exception that have never been criticized. All that is additive. We believe that we're finding parents who become willing to adopt because they're engaged with people who share their faith and they value that. I can't prove that standing here, but we have affidavits saying it for the purpose.

THE COURT: I mean I'll be asking Ms. Kerwin, but you can still even with the existing law, you can still ask birth parents if they prefer that their child be placed with a certain faith, correct?

MR. BROOKS: Absolutely.

THE COURT: So you will always have that ability. The regulation does not vitiate that ability to counsel birth parents and to find out what they wish, what they want. You can as an agency still take that into consideration.

MR. BROOKS: Your Honor, if the situation was created in which New Hope was saying to birth mothers, "The state requires us to let you know about unmarried couples who want to adopt." Take that example. "But we want to tell you we think

that's not right for your child." And they have to counsel applicants about how to form an adoptive family, but their true beliefs are you're not in a position right now the way your life is structured to form the ideal adoptive family. That's not a situation that's good for anyone. That's not a situation New Hope is willing to put itself and those people in.

Their faith teaches them that their efforts should and must be devoted to placing children in families of what they view as biblically mandated family structure and is purely additive, Your Honor. Again coming back to the fact that closing New Hope increases nobody's options. Leaving New Hope open takes nobody's options away. You said, well, the state, they don't want to close them. They just want to change what they do. Well, again, Your Honor --

THE COURT: They want you not to discriminate on the basis of gender, marriage.

MR. BROOKS: The proposition that we don't want to close you.

THE COURT: Sexual orientation.

MR. BROOKS: We just want you to act according to our beliefs instead of your beliefs is just -- that's what the First Amendment forbids when it comes to free exercise. I would direct Your Honor again, and I'll sit down, to the thought experiment that the Supreme Court engaged in. You can look at the discussion in Masterpiece. It said yes. We the Supreme

Court have said states must allow same sex couples to marry, but no, state. You can't say and therefore anybody we authorize to do legally valid marriages, clergymen, clergywomen throughout the state, if you're going to do legally valid marriages, then you must perform same sex marriage. That not the law.

The First Amendment says no, and we live in a society that says, you know what? There's room for these different types of beliefs about these most personal things about humanity, about how people should live and what makes for a good life. We live in a society in which there's room for different groups to do it different ways as they implement what the Supreme Court itself in Obergefell referred to, and let me --

Your Honor has seen the language, but Justice Kennedy in the majority opinion said even as they were mandating that all states recognize same sex marriages, Justice Kennedy took pains to say on page 2607 of that opinion, "the First Amendment ensures that religious organizations and persons are given proper protection as they seek to continue the family structure they have long revered."

It is New Hope's belief in the family structure that they have and so many faiths have so long revered that is precisely and the only reason that OCFS wants now to revoke its license, and we believe that that revocation cannot stand up to the requirements of the First Amendment.

THE COURT: I still think you could preserve that just

by asking your clients whether or not they would consider having their child adopted by a gay and lesbian couple, but you never get there with your clients because of what you say are your sincerely held religious beliefs.

MR. BROOKS: What I say are their sincerely held religious beliefs. Your Honor, the last thing I would say -- and I apologize. This is the second last thing I said I would say -- is on the issue of preliminary injunction, obviously these are deep constitutional waters. There are both emotional and legal complexities and strongly held convictions on these points. But if New Hope is shut down, not only does the Supreme Court say again and again even a temporary deprivation of First Amendment rights is irreparable injury, but in a very practical way, we've talked about the pipe line, reaching out into communities, finding and cultivating adoptive parents. They do that. They're not just people knocking on their doors. Finding mothers, birth mothers before their children are born and working with them. These are a pipe line.

If the lights are turned off at New Hope, they cannot be quickly turned on again. This is a Humpty Dumpty situation. Once the shell is broken, very hard to put together again. So I urge Your Honor after it's over that you think not only about the underlying merits, but the situation that cries out for a preliminary injunction while we take the time to litigate both the facts and the law on that thoroughly. Thank you.

THE COURT: Every time you place an adoption, it's an exercise of free speech. One adoption accomplished. We were able to have our free speech and our free expression. Another adoption. You know, before I got these papers, I never considered private adoptions as exercises of free speech. Okay. We've successfully placed a child, and we've now freely expressed our convictions. I look at that as something different.

MR. BROOKS: New Hope is not trying to send a message to the world. New Hope, it's not that the placement is speech. The placement is certainly an act that might be subject to free exercise issues, but the speech aspect, I think we've tried to make clear both in our pleadings and our briefs that -- and you've been -- as I say, I've been through some of this process, not all of this process. It's an almost all speech ministry.

Before this case came in front of Your Honor, you may not have been aware of the history of faith-based work to place orphans, historically something really kind of originated by the church in Western culture.

THE COURT: Well, I read that in your underlying papers, and that's where I began, that your mission as pointed out in the history that you gave me in your papers was to take care of orphans and mothers in their time of distress. And what you're saying is that every time New Hope consummates an adoption, you've at the same time exercised your free speech,

and it's an odd way to look at adoption.

MR. BROOKS: And Your Honor, that's not how I articulated the speech claim. The speech claim is that the ministry itself on an ongoing basis is almost an entirely all-talk ministry. That is, it's talking in a deep, personal level and counseling about kind of the most important things in life with birth mothers. That's all talk, and it's core talk of the type that's clearly protected by free speech. There's no way to categorize that as conduct or purely noncontroversial information, various carve-outs the Supreme Court has made. That's speech that we seek to protect.

The speech to adoptive, potential adoptive parents as you counsel them about forming an adoptive family, that's core protected speech.

And then finally, the summation of which, the organization must state its view that this adoption will be in the interest, the best interest of the child, that is clearly substantive core protected speech. And in those situations, New Hope believes that to place these children, these infants, these newborns in an unmarried couple, same sex couple would not be.

And what the state says, it's no problem. All you have to do is say yes when you think no and we'll be fine here. Your Honor, that's the speech that's at issue, and it's hard to articulate a more clear compulsion of speech contrary to conscience.

THE COURT: I come back to the fact that because New Hope clearly does not interview gay and lesbian prospective adoptive parents, that you're making those decisions only on the tenets of your Christianity. I wonder what would happen if you ever brought a gay and/or lesbian couple in and sat down with them and talked to them about what their goals were, what their aspirations, what they wanted for a child, but you don't -- New Hope doesn't get to that point because your sincerely held religious belief that it's wrong. We can only adopt out to a marriage of one man and one woman. And your position is if a wonderful gay and lesbian couple wants to adopt, there are plenty of other places that will service them.

MR. BROOKS: Your Honor, again it's comparable to the position of not just the Catholic church but many churches. If a gay and lesbian couple wants to get married, then that's simply not consistent with the teaching of that religious organization. That organization can't do it, though of course the state will through civil marriages. Perhaps some other religious organizations will.

And here likewise, this faith-based organization consistent with its convictions, which I'm not here to try to change them and not here to argue with. Consistent with their convictions says we can't devote our efforts consistent with conscience and faith to putting a child in that situation, but the state thinks it's right and the state does it. The state

does it all the time. Many private organizations are willing to do it. They do it.

All we're saying here is that New Hope should be permitted to continue its ministry consistent with its faith, which is only adding to the number of adoptive parents and is only adding to the number of adoptions completed in the State of New York each year. And Your Honor, it is that that's the key issue, and when we start seeing this case as primarily about the rights of adults --

THE COURT: I'm sorry, but I think you're detracting from the pool because you're excluding a pool of potentially -- I'm not saying that every gay and lesbian married couple would be great parents. That depends on what the independent home study says, but you say you're adding to it. I'm thinking you're excluding from it.

MR. BROOKS: Your Honor, there's no allegation and I don't think there could be frankly that New Hope's faith-based position stops any couple from adopting any more than the Catholic church's faith-based position of performing same sex marriages stops same sex couples from getting married in the State of New York. It just doesn't.

So the reason I say it's additive is the privately funded effort of this ministry, and you know that the home study process is labor intensive. It's time intensive. The state gets fewer than 2,000 done every year because it's really hard

to do. They are voluntarily as a ministry for half a century doing it. They're doing it over and above whatever would otherwise get done. If they're shut down, it's pure subtraction, and subtraction doesn't add, Your Honor. Subtraction doesn't add, and addition can't subtract.

THE COURT: Thank you very much.

Ms. Kerwin, before you can even get a word out, I need to ask. If I were to find in favor of your client, would you be immediately shutting down New Hope? Would there be no period of winding down?

MS. KERWIN: I think it's important to note that OCFS isn't trying to shut down New Hope at all. All its directive was, was that if you can't comply with this regulation and change this policy, you will no longer be able to provide adoption services. So the one sliver of New Hope's ministry or provision of services would have to end. It wouldn't be shut down.

But I think more directly to answer your question, there is and I think it was even in one of the attachments to the complaint. There will be a close-down program or policy developed with New Hope and OCFS to properly deal with anything that is still pending in that sliver of its provision of services.

THE COURT: One of the things that concerns me about your position and the Office of Children and Family Services is

that am I correct that it's a given that New Hope operates completely independently of any state funds?

MS. KERWIN: Funds, yes.

THE COURT: The way you said that, what else do you give them other than funds?

MS. KERWIN: By becoming an authorized agency, they have agreed to, or as a matter of law, the supervision of OCFS. So the only reason that New Hope can even exist as an adoption provider is because New York State has allowed it to. And subject to that authorization is the requirement that New Hope stay under the supervision of OCFS and its regulations. So no, there's no money in and out, but New Hope is acting as a provider of essential social services with the authorization of the state. It can't do so otherwise.

THE COURT: Have any other faith-based adoption agencies to date challenged the law that we're arguing today?

MS. KERWIN: It's not my understanding, no.

THE COURT: Now, in preparing for oral argument, I looked at Section 385 of the Social Services Law. And it basically says that if the commissioner were to find that an agency was willfully violating a multitude of violations, but the violations did not relate to the prohibitions found in Section 385 -- let me rephrase that.

Is the commissioner in any way relying on Social Services Law Section 385 in this proceeding?

MS. KERWIN: No. 385 deals with findings that adoption providers have committed some kind of misconduct. That's not what we're doing here. OCFS was merely auditing the program to make sure there was compliance with all OCFS regulations and found noncompliance. It's not saying that it placed a child in an abusive place or was refusing to consider things that are supposed to be required. It was simply saying there's a policy here not in compliance. We'd like you to stay in business and continue to provide these adoption services, but this one piece -- and there are actually other pieces in the audit that were found to have been things that needed to be fixed.

THE COURT: Under 385, if you found multiple violations and if they were flagrantly doing things wrong, you could revoke their certification?

MS. KERWIN: Right. 385 would apply in certain circumstances as described, egregious misconduct, which is not what we're talking about here.

THE COURT: You know, another question that I have is we have an adoption agency that's been practicing in New York for a long time. If you're not using Section 385, what is it that empowers the commissioner to now say to New Hope, "It's our way or the highway"? Basically even though you believe that you should only have to adopt out to married, heterosexual couples, what gives the commissioner the authority at this stage to say

that if it's not 385 of the Social Services Law?

MS. KERWIN: Social Services Law 372-b(3) empowers OCFS to promulgate regulations establishing the standards and criteria for providing adoption services, and Social Services Law 34 allows OCFS to enforce those regulations.

Now, I think as we all understand here, since New Hope came into being, the law has changed. Society has changed. The policy of the state has changed. The laws have changed, and New Hope has to abide by the law. To say otherwise would be to say that it only has to abide by the laws that existed way back when it was founded, and I don't think anybody here would say that that makes any sense.

THE COURT: Isn't your law forcing New Hope to do something to place children potentially in gay and lesbian marriages that they really truly believe goes against their sincerely held religious convictions?

MS. KERWIN: One thing just before I answer that question directly is that this regulation doesn't just affect gay or lesbian couples. They also will not accept an application from a male and female couple that isn't married.

THE COURT: I understand.

MS. KERWIN: So the pool is restricted even much further than just the consideration of same sex couples. However, no. With this regulation, to answer your question, this regulation doesn't force them to do anything other than

obey the law. So all that the law says is people come in. They are interested in adopting. You have to give them an application.

THE COURT: What about the analogy that I got from Mr. Brooks where New York State says that there can be same sex marriage, but a Catholic priest when asked to conduct a same sex marriage can say no?

MS. KERWIN: New Hope isn't a church. New Hope is a provider of essential social services for New York State.

THE COURT: They're a faith-based organization though, right?

MS. KERWIN: Right. They have a faith-based ministry, which they are more than capable of continuing. I mean I think it's important. The complaint itself shows great things that New Hope has done. It provides a lot of important services to pregnant women for family planning purposes, so foster care services, all things not involved here. What this regulation does is allows -- it forces them to provide services to people who want them.

THE COURT: I know, and that's what I'm being told is a problem because there could be an employee at New Hope, if the Court ordered that they service married gay and lesbian couples and unmarried gays and lesbians, let's take the person who has a sincerely held religious belief. I'm trying to picture the conference room discussion, you know, to prepare a home study

because on the one hand, I may have an employee of New Hope who believes to his or her core that this is religiously wrong, and you want me to put that person at a conference table with a gay and/or lesbian married couple, and you want that employee of New Hope with the sincerely held religious beliefs to have to start inquiring as to whether these would be appropriate parents. I mean they could be choking on their words because they have a religious conviction that this couple in front of them according to the Bible or their historical source cannot be parents. I mean that's a little troubling.

MS. KERWIN: I agree. It's got to be an uncomfortable conversation to have. However, as a provider of adoption services, New Hope just like any other adoption provider has to conduct the adoption study pursuant to specific criteria.

THE COURT: Aren't there a bunch of other agencies in the state of New York and in the United States that would allow a gay or lesbian couple to come forward and to begin the home study process and the adoption process?

MS. KERWIN: Of course there are, but that doesn't mean that a provider of adoption services in New York State can tell them to go someplace else because of something that has nothing to do with their ability to parent. That's all that this is about is making sure that providers of adoption services in this state consider only characteristics that go to an adoptive applicant's ability to parent, and we never even get

there at New Hope. They ask for applications at the door. They're turned away. So all this is doing is saying consider whether I'd be a good parent based on characteristics that have to do with the ability to parent.

THE COURT: With the regulation that's in issue in this case, 18 NYCRR 421.3(d), I think it is, can New Hope still ask possible birth parents about whether they would feel comfortable adopting out to a gay or lesbian couple? Could they ask is there a particular Christian denomination that you would like the child to go to? Is that permissible under 421.3(d)?

MS. KERWIN: Not only is it permissible under that regulation, but it's required under Social Services Law and other regulations that the birth parent's wish, religious wishes are honored to the extent that they could do so and be in the best interest of the child. That doesn't change. The religious background of the child is very important in New York State adoption policy, as is the wishes of the birth parent.

Here, we're talking about the religious wishes of an adoption provider, and that is not something that the Constitution, that the Constitution in this kind of case has to consider over the wishes of the birth parent of the child.

And to the other part of your question, no. I don't think there's anything about 421.3(d) that prohibits the inquiry of a birth parent about the type of family that she or he wants their baby to go to.

THE COURT: What about the Masterpiece Cake case as it relates or does not relate to this case? What's your position on that?

MS. KERWIN: I think that the -- I think that the reasoning does apply here because Masterpiece Cakeshop was very specific in its decision to say our holding here applies to the particular facts of this case in which the adjudicating administrative body made express discriminatory statements to the baker. But it also made a good point to say had that not happened, had that hearing not happened and those statements not be made, it's very likely that the decision might have been different because it's important to look, is it generally applicable? Is it content neutral? And here it is, and that case was very different for that reason.

THE COURT: When we talk about content neutral in this case, one prong of that is that the law advances an important governmental interest unrelated to the suppression of free speech. Is that what you think you have here?

MS. KERWIN: Absolutely. I mean the important government interests are expanding the number of people who can adopt and ensuring that the primary consideration in evaluating applications is the capacity of prospective parents to meet the needs of the children. Those are certainly important state interests.

THE COURT: But doesn't it substantially burden free

speech in this case, again getting back to that awkward conference room scenario where someone who believes to his or her core that marriage can only be between one man and one woman, for somebody like that to be compelled by the state to be sitting down with a gay and/or lesbian couple? Doesn't that substantially burden speech?

MS. KERWIN: It doesn't because it neither compels nor prohibits New Hope from expressing its beliefs or associating with others for the purpose of expressing those beliefs, no matter how uncomfortable that conference room conversation might be. There's no narrow way to assure that social services are being provided in this state in a nondiscriminatory manner. Permitting exemptions to certain religious groups would be an impermissible favoring of particular religious beliefs.

The overwhelming state interest here is that New York State wants to provide, have services that it authorizes be provided in the state be done in a nondiscriminatory manner. If it gives exemptions for some organizations to discriminate based on characteristics that have nothing to do with the ability to parent, it would completely undermine the interests.

THE COURT: If a birth mom were presented with three potential adoptive families, two being marriages of one man and one woman and the other being of two men, and the adoption agency sits down and says, "We have the home studies here of three couples. Here you go. Our sincerely held religious

belief is that only these two heterosexual couples will provide appropriate parenting for your child, but you decide." Would that be a violation of the regulation?

MS. KERWIN: That's an interesting question because this case is about whether they have to accept them into the organization at all.

THE COURT: Right.

MS. KERWIN: We haven't got to the matching piece.

THE COURT: I'm looking at the breadth of your law. I'm just wondering if they did bring three potential families to a birth parent and say, "Here you go. We're a faith-based organization and we don't really condone this, but here. Here's what we know about these two heterosexual couples. Here's what we know about this marriage between these two men, and you decide." Just wondering would they be able to do that under your statute?

MS. KERWIN: Standing here on my feet, what I think is that as long as New Hope said these three couples have gone through the adoption process, they've been deemed to be appropriate prospective adoptive parents according to the regulations that exist and are in effect right now and have an opinion. New Hope has an opinion based on marital status or, you know, people live on the beach. I think they can give their opinion about that as long as they don't mischaracterize the findings of an adoption study.

THE COURT: Okay. Is there anything else that you want to bring to my attention?

MS. KERWIN: No, Your Honor. I just think this case is a lot simpler than it seems to have come out this morning.

THE COURT: It doesn't seem simple to me. I will tell you that.

MS. KERWIN: But what it comes down to is New Hope provides adoption services with the authorization of New York State. Whether it likes it or not, it has to abide by New York State laws and regulations with respect to the provision of those services, and it doesn't want to. It wants to use, like Your Honor said, a litmus test before it even allows a prospective adoptive family in the door, and it has nothing to do with the ability to parent, and there can certainly be nothing -- I don't think anybody here could disagree that a person's ability to parent and take care of the needs of a prospective adoptive child is what's important here.

THE COURT: But they do believe that your regulation is not content neutral, in fairness to them, and they indicate that it requires strict scrutiny and that it should not survive strict scrutiny.

MS. KERWIN: I know that's what they say, but it's a fact any law can incidentally affect someone's religious beliefs. There has to be a line, and this regulation could not be more on its face neutral. Do not discriminate on these

things that have nothing to do with an ability to parent at the outset. Then do a study, determine, think about all sorts of things, but don't shut them down at the door and not give them a chance based on something that has nothing to do with ability to parent.

THE COURT: Thank you.

MS. KERWIN: Thank you.

THE COURT: Mr. Brooks, if you want to take another five minutes to respond, you can.

MR. BROOKS: I'll try to tick rapidly through several things.

Counsel ended as their briefs ended on the principle of, look. All we're saying here is that New Hope needs to abide by the law, but that describes the situation of every free exercise case. That just isn't advancing the ball. What the First Amendment says and free exercise says is no. In certain circumstances -- and we have the whole body of law. I won't rehash it -- a law that violates faith does not need to be complied with. I just want to flag that.

She made the argument that to grant New Hope an exemption, let's leave aside whether it would increase the number of adoptions or not. She said it would be an impermissible favoring, again when you go through the free exercise, because it would create an exemption for a special religious group. When you go through the Sherbert versus Verner

case, unemployment compensation, Hosanna-Tabor, employment law, there's just a variety of issues. Again our free exercise law is built around situations where the Court says, our courts say, sorry. The First Amendment says you must make an exemption for a religious group.

You asked an important question about speech to birth mothers. Would it be okay -- let me just in context, New Hope believes that the right way to do its business, and frankly I don't know how much of this is required, but the right way to do its business is to show birth mothers only parents and portfolios, several parent options, each of which New Hope believes could be consistent with the best interest of the child.

So asking New Hope to slip into that one that they would then need to say, "Oh, by the way, the state requires us to show you this couple, but let us tell you all the reasons why we think they would not be the right choice for your child." The notion that the state would let that go forward without coming down on New Hope like a ton of bricks --

THE COURT: You'd probably be sued in federal court the next day.

MR. BROOKS: -- is scarcely credible. Exactly. So it's not just the initial conference room. It's scene after scene in this, including follow-up studies and reports back to the birth parents about the situation. As I think Your Honor

knows from the papers, New Hope is almost always doing somewhat open adoption and plays an ongoing intermediary role and has ongoing speech related obligations between.

So the complexities of forcing a faith-based organization to in any way facilitate something that it believes to be not right for the children and either saying that, which creates kind of almost incomprehensible situations, or being muzzled and censored from saying what they believe to be true, either one of those cannot be the right answer, Your Honor.

The counsel also indicated that at the beginning of her remarks, look. The only reason New Hope can be in this business is because the state authorizes it. The state grants them a license, and absent that, it couldn't provide this essential social service.

I talked about the Masterpiece case. In many ways, Your Honor, the NIFLA case from last term has at least equally and perhaps more important things to say about this case. One of the things that the NIFLA case says, and we've discussed this in our papers, is that by granting, by making something a licensed activity, the state doesn't gain increased power to violate First Amendment rights. I will refer Your Honor to papers on that. So again just as all we want you to do is obey the law is not an answer to a free exercise or free speech claim, neither is, look. If you didn't have a license, you wouldn't be allowed to do business. That also is not an answer.

She said also referring to -- I frankly forget what triggered it. She said, look. New Hope is not a church. It's a provider of essential social services. Well, again, our First Amendment law, relatively few of the cases are about churches. This is a right that pertains to the religious faith of citizens, not to churches qua churches. Now, citizens gather into churches, but citizens gather into faith-based organizations of all sorts. The Boy Scouts are not a church. You can go down the list of the leading cases in our constitutional history of free exercise, and they're generally not about a church. These rights pertain to us as citizens.

Your Honor asked about a wind-down period, whether there's going to be kind of immediate cessation. You may not talk to people. We have a nonbinding statement in a footnote that the state would not prevent such a wind-down, but that's really kind of irrelevant to my Humpty Dumpty breakage analogy here because it's the pipe line that's critical. If you're winding down, then you are reducing staff. You're losing that capacity. You're not able to go out and tell birth mothers, let us work with you. We would love to work with you. You're not able to go out and recruit new parents. Very difficult, not necessarily impossible, but very difficult to turn the lights back on. And as you know, being deprived of First Amendment rights for any length of time is conclusively held to be irreparable injury under the law.

And with that, Your Honor, I will stop. Thank you for your attention.

THE COURT: Thank you. I thank both sides. I will get a written decision out as soon as possible. Thank you.

(The matter concluded at 12:03 p.m.)

CERTIFICATION OF OFFICIAL REPORTER

I, JACQUELINE STROFFOLINO, RPR, Official Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 28th day of June, 2019.

/s/ JACQUELINE STROFFOLINO

JACQUELINE STROFFOLINO, RPR

FEDERAL OFFICIAL COURT REPORTER

EXHIBIT G

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NEW HOPE FAMILY SERVICES, INC., Plaintiff-Appellant, v. SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York, Defendant-Appellee.	CASE NO. 19-1715-CV ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOSÉ A. CABRANES, REENA RAGGI, AND EDWARD R. KORMAN

November 13, 2019

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BE IT REMEMBERED that Oral Argument was held at the Thurgood Marshall US Courthouse, 40 Foley Square, New York, New York, commencing on the 13th day of November 2019.

BEFORE: José A. Cabranes
Reena Raggi
Edward R. Korman

APPEARANCES:

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(Commencement of audio recording file labeled 2019.11.13 NHvP Oral Argument 19-1715 at 00:00:00.)

JUDGE CABRANES: Good afternoon. We have one case for argument today, which is New Hope Family Services Incorporated versus Poole.

We'll hear from Counsel.

MR. BROOKS: Your Honor, this is Roger Brooks with Alliance Defending Freedom, for New Hope Family Services.

There are currently 20,000 children in foster care in the state of New York, of whom 4,000, at any given time, are qualified and waiting for adoption, and less than half of those will, in fact, be adopted within a year. It's an overstretched system.

Faith-based agencies make an outsized contribution to meeting that crisis and --

JUDGE CABRANES: Why is that? Is that because there are not enough agencies or not enough people who want them?

MR. BROOKS: Your Honor, I think it's -- I think there are waiting lists to adopt as well, so the answer is -- this is not in the allegations of the complaint. I believe the answer is that it's really the nexus. It's the agencies. It's the resources made available by the State and by private services.

And the faith-based agencies are just proportionately helpful because they are -- have the ability to reach into faith communities which have a demonstrated disproportionate willingness to adopt hard-to-adopt children, such as those with disabilities and those with -- born with addiction, which is a very large problem in today's world.

JUDGE RAGGI: I don't understand your adversary to be disputing, at least at this time, that your placements are done responsibly. They just want you to expand the pool of applicants that you will consider.

So why don't you tell us -- I mean, I think you can assume we know some of what you've been emphasizing now. What is your constitutional claim here that you say survives the Motion to Dismiss?

MR. BROOKS: Your Honor, of course, and a Motion to Dismiss is inherently complex. I want to -- I would like to emphasize two things.

As to free speech, I would say the mask is off.

In briefing to this Court, the State has now made very clear that it intends and expects the regulation to compel and censor New Hope's speech. I think that claim survives, and indeed a Preliminary Injunction should be entered on the basis of the free speech claim.

JUDGE RAGGI: Well, I expect they're going to dispute that they're compelling speech. So why don't you tell us why you've got a colorable claim that they are?

MR. BROOKS: Yes, Your Honor.

In our complaint, we alleged New Hope's beliefs about what's faith teachings about marriage and the best interests of children, and further allege that New Hope does and wants to teach that message to both birth mothers that it works with and adoptive couples that it works with.

Now, the District Court found that OCFS and the regulation, quote, simply do not compel speech, and that was failing to accept the allegations. But more dramatically, that finding by the Court has since been repudiated by the State in the briefings to this Court.

I would call Your Honor's attention to the State's brief filed in opposition to our Emergency Motion for Interim Relief, which is ECF No. 101. And there they said, The regulation does not, quote, restrict New Hope's speech unrelated to its provision of adoption services. And they said the regulation that New Hope is, quote, not precluded from espousing its beliefs about marriage and family outside the contours of its adoption program.

Well, that's fairly plain English. And what they're saying there is what we alleged -- that is that the inescapable effect of the regulation is to constrain and to compel New Hope's speech as it deals with birth mothers, as it deals with adoptive couples.

It says, No, you can't speak about or advocate your Christian beliefs about marriage and the best family for children to adoptive parents and birth parents, even though they chose to come to you as a very clearly identified Christian ministry. So there's really no more denial of the intent to change what New Hope can say in the midst of what is its reason for existence.

How do they try to excuse that? They also don't really -- the State doesn't really defend the District Court's finding that all of New Hope's speech has been ex-appropriated and is now governmental speech. Instead, they argue that it's -- it's okay to censor and compel, because this is speech merely incidental to conduct, and they rely heavily on the Rumsfeld versus Fair case. I claim that case.

JUDGE RAGGI: The Certificate of Authorization, which I understand predates this regulation by many years, nevertheless says that you will function in complete cooperation with all existing social welfare

agencies. Once the welfare agency defines the pool of people who are qualified to adopt, what are you claiming is the right you have to not cooperate on that point?

MR. BROOKS: Well, of course, Your Honor, a general obligation to cooperate can't be leveraged to accomplish unconstitutional ends.

JUDGE RAGGI: Mm-hmm.

MR. BROOKS: We're claiming that we can't -- we're claiming that my client can't be compelled to bring into the discussion that it has -- it has group meetings, it has prayers -- that it can't be compelled to engage in discussions that seem to approve same-sex or unmarried couples as consistent with the best interests of children. It can't be compelled to present those as recommended parents to birth mothers who come to it and entrust their child to it for placement.

JUDGE RAGGI: Even the State policy, though, can you be compelled to refer? I know you say you do refer. But can you be compelled to refer, so that if a gay or unmarried couple comes knocking at your door, rather than closing it, you have to refer them?

MR. BROOKS: Your Honor, that may present hard questions, and I haven't thought about it, because my client has been happy to do so. So whether -- whether that might be unconstitutional to require one to

refer -- I think there have been cases that have arisen in the abortion context that suggest that requiring one to refer -- and certainly there have been cases that say that requiring one to post referral information is an unconstitutional compulsion. So I think that's out there.

JUDGE RAGGI: Let me ask you that apropos this particular case, because if we were to agree with you and to vacate the dismissal, you want us also to grant you a Preliminary Injunction; is that right?

MR. BROOKS: That is right, Your Honor.

JUDGE RAGGI: Now, that Preliminary Injunction, by contrast to the one we have entered, would allow you to continue to pursue new applicants. Am I right? The injunction you want if -- on remand?

MR. BROOKS: The injunction that we want on remand, Your Honor, is exactly as the previous injunction, minus Paragraph 2, which restricts my client's ability to take new applicants. Because otherwise, it will kill them --

JUDGE RAGGI: Right. So that's not an insignificant difference.

So if we were to agree to that -- and I'm not saying we would -- would you also agree to commit yourselves to referrals of any -- any gay or unmarried

couples who sought to adopt with you in the interim?

MR. BROOKS: Yes, Your Honor.

JUDGE RAGGI: Okay.

MR. BROOKS: I would like, in the short time available, to point out one other thing, that is that the State has admitted that facts alleged by New Hope plausibly allege animus. We alleged various facts and statements that I can't recite.

I'd like to call the Court's attention to the State's brief at page 43 and 44, when they said of those facts that we alleged, they referred to them as, quote, arguably ambiguous and susceptible of different interpretations.

I'll take that. If it's arguably ambiguous, then that means that for purposes of the Motion to Dismiss, it's necessary to draw the inference in favor of my client.

And thank you, Your Honor. I have reserved.

JUDGE CABRANES: You have indeed. But we can go on with some questions then.

MR. BROOKS: Yes.

JUDGE CABRANES: You can feel more at ease.

Let me just ask a few things, so I understand your argument.

Religious organizations, they're not excused

from complying with valid and neutral laws; right?

MR. BROOKS: Well, Your Honor, we have pointed out that there is precedent that suggests that if even a valid neutral law reaches right into the heart of faith and disrupts that, that perhaps the answer is no. And we've referred to the Hosanna-Tabor case. We've referred to the dictum in, I believe, Masterpiece Cakeshop saying, well, of course, the State couldn't require a faith -- a religious organization, a church to perform a same-sex wedding, even though you can readily imagine a facially neutral law that says everybody who is authorized to perform legally valid weddings must perform all legally permitted weddings.

So I think the answer is not necessarily. But we're also happy to -- we would also believe that we've alleged facts and, indeed, put in facts that meet the requirements of Smith.

JUDGE RAGGI: Is that -- is there a distinction, though, between something such as the marriage ceremony, which is viewed as a sacrament by the faith, and adoption, which is certainly a charitable function that you tie back historically to faith organizations, but is not a required sacrament or ritual of the faith? Is there a difference there?

MR. BROOKS: Well, I certainly don't think that

the law can turn on what one church or another or faith or another calls a sacrament. The Catholics consider marriage a sacrament; Protestants don't.

JUDGE RAGGI: No, no. But I mean, you understand my point here. You're not suggesting that New -- New Hope views this as a religious ritual that is part of its -- part of its expression of faith. Or do I misunderstand?

MR. BROOKS: I would say that it is the view -- New Hope views it as more important than a religious ritual: That is that the forming of a family, that the placing of a child into the family, the formation of the next generation is frankly central to any major faith system. It is at the very core. And you can kind of go through them and think through the ones that you've encountered. It's at the center.

So the marriage ritual is considered a sacrament, not because it's a religious ritual, but because it's forming a family. And by placing children into a family, New Hope does believe that it's engaging something of the utmost human and religious importance.

JUDGE RAGGI: But it can only be done pursuant to the laws of the State. As the New York Court of Appeals explained, it didn't even exist at common law. So it's only a matter of State law. That suggests it

operates separate and distinct from the religion that seeks to foster it.

MR. BROOKS: Well, adoption as -- adoption as a legal thing and adoption as a human thing, I suppose, are not the same. Adoption has existed since time ancient. And faith-based organizations have been taking in families and placing them in homes since time ancient. And I expect to put in expert testimony about that very issue at trial.

But the bottom line, I would say, is that when you look at Hosanna-Tabor and when you look at the discussion about performing marriages, what those have in common and what other similar cases have in common is they're about this thing at the heart of human existence, which is family and the formation of the next generation. And that is sacred and protected, we believe, is kind of what the Court is groping at. I do not claim that that is a well-developed area of law or crisply defined.

JUDGE CABRANES: Mr. Brooks, let me ask you a question or two. Is there any indication in a time that the regulation was adopted, the OCFS had any specific hostility toward religion?

MR. BROOKS: I think the contemporaneous evidence, Your Honor -- and these things unfold fairly

quickly -- was I think we've cited a public statement in which they've said, There's no place in New York for any agency that doesn't comply. We've cited them referring to this type of belief as archaic --

JUDGE RAGGI: They referred to the regulations as archaic.

MR. BROOKS: The regulations are archaic because they embody exactly this belief, which, as you well know, was the legal requirement until not so long ago. So I think that.

And then followed up in fairly rapid succession by the statement of the enforcing officer who says other Christian organizations have decided to compromise and stay open.

Well, what does that tell you? It tells you somebody is keeping track. They know who this is affecting, they know what the results are keeping, and they know what they're trying to achieve.

JUDGE CABRANES: Let me ask you, Mr. Brooks, perhaps if you can recapitulate for us the timeline of proceedings in the District Court. Because I'd like to know how much you've done in the District Court; and also, ultimately what I'd like to ask you to do is focus on the applicable legal standards for preliminary injunctive relief. So why don't you tell me exactly

what took place in the District Court.

MR. BROOKS: What took place in the District Court, Your Honor, was submission of the complaint, submission of a Preliminary Injunction Motion with attached affidavits; responsive affidavits, which I think as we've pointed out in the brief, say what they say, but don't, in fact, contradict key facts. So the facts are as alleged for that purpose. And then an oral argument -- that is there was no evidentiary hearing; there were no witnesses on the stand.

JUDGE CABRANES: Was there a request for an evidentiary hearing?

MR. BROOKS: There was not a request for an evidentiary hearing, Your Honor, so --

JUDGE CABRANES: That's what -- that's what you seek in any kind of decretal language that we may issue. What is it that you want? Let's look at it that way.

MR. BROOKS: What do we want?

JUDGE CABRANES: Right.

MR. BROOKS: What we would -- what we want is remands to proceed into discovery. I think many of these issues would benefit --

JUDGE RAGGI: Vacate the dismissal.

MR. BROOKS: Vacate dismissal, grant a preliminary -- instruct the Court to enter a preliminary

injunction while we proceed with full-scale litigation, is what we want.

And on your point, I should emphasize that what New Hope could -- was happy to agree to as an interim measure, just pending this appeal, that is we will moot the issue of discrimination with applicants by taking no applicants. If that's left in place throughout a discovery and trial period, it will kill New Hope by strangulation as surely as the effort by OCFS a few weeks ago would have done.

JUDGE CABRANES: What would you be looking for in discovery?

MR. BROOKS: What would we -- we would be probing exactly the question of who has this been enforced in? Or is -- we have limited visibility, and we see that in -- right in this time period that New Hope's being threatened that a number of faith-based organizations disappear off the list of approved organizations.

Well, needless to say, we'd like to see internal documentation that goes both to actually the formation of this. What's the proximate cause? Why did they feel the need for this? I think I know the answer, but I haven't had discovery. And then is enforcement targeted? Are they out there doing what they did to New

Hope, to faith-based agencies, saying, you know what, everything's good here, and it's all in good order, but we need to see your policies. And that's what happens in New Hope.

So we would be looking for evidence of targeting both in its origin and in its enforcement. I think also in the allegation that this policy is furthering, is actually furthering any compelling interest, something that would need to be showed under strict scrutiny is going to be very difficult for the government to prove, and we intend so establish facts that will disprove furthering.

JUDGE CABRANES: We'll turn to the standards of -- for injunctive relief. There may be agreement. And we'll ask the government or the State to comment on this, the first prong is irreparable harm. In your view, that's been settled?

MR. BROOKS: In our -- in my view, that's settled as a matter of law. That is, if it's likely that there's a violation of first amendment rights, that just is irreparable harm. And frankly, I think the uncontradicted facts, the fact of closure of New Hope, seeing that as irreparable harm is not difficult, but it's also not necessary, because the law is so clear that any deprivation of first amendment rights, even on

a temporary basis, is irreparable harm.

JUDGE CABRANES: Well, what else do you need to show us here or the District Court on remand in order to secure Preliminary Injunctive relief?

MR. BROOKS: The answer, Your Honor, is simply likelihood of success on any one of the claims, any one of the first amendment claims, period.

JUDGE CABRANES: That standard is particularly difficult to meet when a party is seeking an injunction against a government.

MR. BROOKS: Well, Your Honor, I think that kicks in at -- that rule kicks in when you're talking of balancing of harms. But in the first amendment area, I believe it doesn't. I think the law is clear that if I can show -- if I can convince you that we have a probability of success, then it follows necessarily that there's irreparable harm as a matter of law, and we're done with the Preliminary Injunction analysis.

JUDGE RAGGI: The difference between your demonstration of premature dismissal and -- and likelihood of success, though, seems to be something we have to consider. I mean, you've argued that there's ambiguity as to why they passed the regulation and that that should entitle you to discovery. Even if we were persuaded of that, ambiguity doesn't necessarily get you

to likelihood of success. How do you satisfy the likelihood of success?

MR. BROOKS: Let me tell you what I think are the two strongest points on that. One, in light of the facts alleged, and now frankly admitted by the State with regard to speech -- compulsion of speech in these interactions, I think that you should find a likelihood of success. They say the result of this regulation is we're free to say whatever we want outside the scope of the ministry. That's a major issue.

JUDGE CABRANES: And I want to understand your freedom of speech argument. You know at the outset of a process, when a couple appears, whether they're married and heterosexual. What -- what else do you do? I mean, you don't conduct your traditional evaluation because it would be a waste of time given what your bottom-line policy is. So what -- what speech are you -- are they preventing you from engaging in? I just want to understand that.

MR. BROOKS: The -- I think the point is if New Hope was required to bring those people into the counseling conference room, then New Hope would be compelled to have any sort of good faith counseling of them to be prepared to be adoptive parents. When New Hope believes that they can't be best interests of the

child adoptive parents, it puts New Hope in an impossible situation, which is why the State's exactly right that if this is compelled, then New Hope is left free to say what it really thinks only outside the scope of its adoption service. And if New Hope is compelled to do home studies for these folks, and evaluate them and as OCFS clearly intends, to recommend these couples to their -- to the birth mothers who come to them and say, help me select a home for my child, then that recommendation is contrary to what New Hope believes to be true. According to the teachings of its faith, it believes it cannot be in the best interests of the child.

So that's -- and that's -- it's really the compelled speech. Because obviously, if you bring somebody into your group discussion with other parents, who violently disagrees with your faith principles, that puts a damper on the conversation. That kind of brings us into some of these associative communication cases and concerns about changing my message.

But when it comes to the birth mothers and counseling a specific couple, it really requires New Hope to say things that they believe that their faith teaches them is false and ought not to be said.

JUDGE RAGGI: In the end, doesn't the regulation

really require you to be open to the idea that you would say that it is in the best interests of a child to be adopted by an unmarried couple, by a gay couple, and that that is what you absolutely cannot say, according to your brief, consistent with your faith; is that right?

MR. BROOKS: Your Honor, that is exactly right.

JUDGE RAGGI: So it's -- you're arguing that it starts with the first counseling session. But to be in good faith compliance with this regulation, you have to, in the end, be prepared to say that it's in the best interests of child to be adopted by an unmarried or by a gay couple.

MR. BROOKS: New Hope -- correct. New Hope speaks in three directions in this relation: One is to the would-be adoptive parents; another is to the birth mother -- and each of these generally pick New Hope because it's a faith-based ministry, one of a few out of many secular and state agencies; and third, it speaks to the state in a final report in which it must -- it can only certify if it believes that this placement is in the best interests of the child.

And again, it's obviously intended that New Hope not discriminate in that, even though it's faith teaches it that in no case is that in the best interests of the

child. So that's -- they're not stopping -- they will refer. They're not -- there's no allegation that anybody has been prevented or even discouraged from adopting, but they say we can't devote our resources.

And they're all private resources. Not a dime of State money involved in this, that we can't devote our energies and our resources to placements and all those relationships of speech that we believe are wrong.

JUDGE KORMAN: And the State would preclude you, in your view, from asking a parent who says they prefer a child with the Catholic -- Catholic parents be placed with a Catholic family. Would you be permitted to ask the birth mother whether she would want a placement with a married, heterosexual couple? Forget about persuading, just --

MR. BROOKS: The regulation doesn't say anything about that, Your Honor, so I don't know the answer to that.

JUDGE KORMAN: But the regulation does talk about deference to the wishes of the --

MR. BROOKS: Well, it --

JUDGE KORMAN: -- religious wishes.

MR. BROOKS: It does with the religious wishes. And indeed, the State -- this takes me to the second point where I -- to answer both your questions at once,

I hope.

Yours is on what grounds do I think my client's entitled to Preliminary Injunction. And yours takes us into the area of general applicability and what exceptions are permitted and not permitted. And this is an area where I think also -- and it's so fact-intensive in detail that I can't begin to recite it all in argument, and it's better done in writing anyway, and you have that.

What I would say is that the different treatment of my client's beliefs here is exactly highlights the problem. That is, we begin with the regulation that purports to outlaw discrimination on the basis of a whole long list of protected characteristics, and more besides. And then you start shooting holes in it with exceptions, and there are many exceptions.

There are exceptions permitted or required when it comes to going out and recruiting parents. Who gets to the front of the line, who gets to the back? There are exceptions allowed, even on the basis of race, the most troubling category in our nation's history and our constitutional law -- there are exceptions for that. There are exceptions for ethnicity for religion.

You're required to take the religion of the child into account. You're required to place the

child -- the religion of the child's origin into account. You're required to place the child with a family of the same religion, so long as that's not inconsistent with the best interests of the child. All these substantial exceptions to things that in other contexts, we would consider to be unacceptable discrimination based on those categories.

The only category that OCFS says that we could never consider, we could never contemplate, I think was their word, an exception on that basis is the one belief which OCFS knows and has said is primarily in today's world and this state associated with religious faith -- and that is the belief in what many people would describe as old fashioned, and they would describe as a traditional and biblical view of marriage and the form of family and the best interest of the child.

JUDGE RAGGI: Okay.

JUDGE CABRANES: Now -- go ahead.

JUDGE RAGGI: Do you in any way challenge before this Court the authority of the agency to shut you down, or to have promulgated this particular regulation given the language of the statute that was enacted by the New York legislature?

MR. BROOKS: Well, Your Honor, we have chosen to focus the claim on the fact that whatever their

authority, it can't be used for an unconstitutional end. I think that possibly one could construct an ultra vires argument under state law. We've come to the federal courts to defend the federal constitutional rights of my client.

If I may, one last thing on the Preliminary Injunction, because I know I'm substantially over time. I want to call -- and this is on the issue of exceptions and general applicability, and are we making exemptions for secular reasons and refusing them for beliefs held for religious reasons?

I would call the Court's attention to the Central Rabbinical Congress case, 2014, 2d Cir., page 197. And there the 2d Circuit said that when a law burdens free exercise, the burden is on the State to demonstrate that the law is generally applicable if it wants dismissal.

And I would encourage the Court to go look at that because that's what it says in rather plain English in that case of just a few years ago. So -- and I think it's not necessarily intuitive to start with. But that was a dismissal case, and the Court says, We're not convinced by the State that this is generally applicable, so dismissal reversed.

JUDGE CABRANES: Before you sit down, if we

ruled for you on First Amendment grounds, as you're asking us to do, what would prevent there -- a racist adoption agency from denying service to black families?

MR. BROOKS: Well, let me come at that from two ways, Your Honor.

JUDGE CABRANES: Please.

MR. BROOKS: Not a surprising question.

First of all, race is -- just has a distinctive place unfortunately in our history and fortunately in our constitutional jurisprudence and in the constitution itself.

So -- and if you think about what the Supreme Court said in, let's say, the Bob Jones case about racism or the Rodriguez -- Peña-Rodriguez case about reaching -- breaking into the jury inviolability; and you compare that to what the Supreme Court said about exactly the type of beliefs that my client holds in the Obergefell case itself and in the Masterpiece Cakeshop case, I think you will see that they're conceived of as such very different things that you don't need to worry about the -- about the bleed over. That's something that can be handled if it comes up.

And has it ever historically come up? Yes. Has that problem come up in recent decades in the courts? I think the answer is no. If it does, then strict

scrutiny is out there, and strict scrutiny is strict, but it's not -- it's not contrary to a couple of things that have been said. It's not always fatal. It's still there to protect us.

The other thing I would say is that it's kind of -- of course, we all ask that question of ourselves when we think about a case like this, but it's ironic because then we have this situation where, in the adoption context -- because the overriding -- in general, in our law, race discrimination is an overriding concern.

But when it comes to adoption, the overriding concern is the best interest of the child. And so we see the law and we see the regulation as not just permitting, but requiring selection based on race. Again, that takes us back -- and I won't repeat the point that there's exceptions for every type of belief and secular beliefs about what's in the best interests of the child, no exception allowed for my client's belief based on their faith teachings.

JUDGE CABRANES: Thank you very much.

MR. BROOKS: Thank you, Your Honors.

JUDGE CABRANES: Counsel, you're just -- I have a simple clerical question. And we may have your name incorrect on the form that I have it. Your surname is

E-T-L-I-N-G-E-R?

MS. ETLINGER: That's correct.

JUDGE CABRANES: Thank you.

MS. ETLINGER: Good afternoon, Your Honors, Laura Etlinger for Commissioner Poole.

I'd like to start with just two points before we get into the actual constitutional claims. And one is that New Hope essentially asked to be let alone to perform its adoption services as it sees fit. But it's only allowed to engage in these adoption services because it's authorized by law to do so and agrees to operate pursuant to strict statutory standards.

This is not a case where the State is intruding on private religious practice. This is a robust regulatory scheme that they have chosen to get involved in.

If New Hope wanted to make sure that it was only involved in any adoptions that had to do -- that where the family was a married, heterosexual couple or a truly single parent, it could counsel birth parents that that is what they should choose. And if they were able to locate a specific family that the birth parent wanted to adopt to, they could facilitate a private placement adoption.

JUDGE CABRANES: Help me with the --

understanding the record.

You seem to suggest that the agency has insinuated themselves into this regulatory scheme. Were they in existence before the regulatory scheme came into existence?

MS. ETLINGER: Since they've been in operation, there has been a regulatory scheme for adoption services under New York law.

JUDGE CABRANES: Right. And has that regulatory scheme been -- is it the same as it is now?

MS. ETLINGER: It is essentially the same in term --

JUDGE CABRANES: Well, no. I didn't say essentially. Did it include this particular issue?

MS. ETLINGER: No. This regulation was adopted in 2013, after they had already been providing services.

JUDGE CABRANES: And after they had been licensed by the State; is that right?

MS. ETLINGER: Yeah. They're not exactly licensed. But after their corporate --

JUDGE CABRANES: They're permitted to --

MS. ETLINGER: -- will have been --

JUDGE CABRANES: -- they're permitted to exist.

MS. ETLINGER: But OCFS has ongoing authority to make sure that an agency is operating pursuant to state

law.

JUDGE CABRANES: No. I understand that.

JUDGE KORMAN: Which state law are you talking about?

MS. ETLINGER: I'm sorry.

JUDGE KORMAN: We're making the law. There's no New York State statute that --

MS. ETLINGER: No. This is a nondiscrimination regulation that's entirely consistent with state law.

JUDGE RAGGI: Well, the state law, when it was enacted, prompted statement by the governor -- and this is in the bill jacket.

MS. ETLINGER: Yes.

JUDGE RAGGI: It wasn't going to require any policy differences, that the legislation was permissive, not mandatory.

MS. ETLINGER: And the agency at another time felt that that was not consistent with the law, that the law allows --

JUDGE RAGGI: Which law?

MS. ETLINGER: The --

JUDGE RAGGI: It's not consistent with which law?

MS. ETLINGER: Domestic Relations Law, Section 110, was amended to specifically allow unmarried

and same-sex couples to adopt.

JUDGE RAGGI: Right. But when he signs that statement, the governor --

MS. ETLINGER: Yes.

JUDGE RAGGI: -- says it's permissive. It would not compel any agency to alter its present policies.

MS. ETLINGER: Yes. And the --

JUDGE RAGGI: And so to that extent -- I mean, if this were ever to go down the road to less restrictive alternatives, why wouldn't this law be satisfied by a requirement that agencies that have religious objections refer to the State?

MS. ETLINGER: Well, I'd like to address that, because a referral doesn't eliminate the harm that the statute -- that the nondiscrimination regulation seeks to prevent. When new --

JUDGE RAGGI: Let's stay focused.

You've just told us that this regulation is entirely consistent with the statute, and my question suggests to you that the regulation goes beyond the statute. Do you not agree with that?

MS. ETLINGER: The statute doesn't speak to what adoption agencies may or may not do. So in that sense, the regulation regulates something that's outside the scope of the statute.

JUDGE RAGGI: Right. And before we get to that, explain to me what it means to have a permanent or Perpetual Certificate of Incorporation for an adoption agency in New York, which is what I understand New Hope had before this regulation went into effect.

MS. ETLINGER: Yes. That means that their corporate existence is perpetual. But that is separate from --

JUDGE RAGGI: For purposes of conducting adoptions.

MS. ETLINGER: It's their corporate purpose is -- their corporate existence is perpetual. But their authority to engage in adoption services is always subject to OCFS's ongoing approval under --

JUDGE RAGGI: What's law or statute explains that to them?

MS. ETLINGER: Under Social Services Law, Section 34, which says that OCFS can make sure that authorized agencies are performing pursuant to state laws and regulations; and also 371, Subdivision 10, which indicates that an authorized agency consents to approval, visitation, inspection, and supervision, and that must necessarily mean ongoing supervision and inspection and approval.

JUDGE RAGGI: And they were indeed inspected

shortly before you sent -- you all sent -- when I say you --

MS. ETLINGER: Yes.

JUDGE RAGGI: -- [indiscernible] sent the letter that told them that they were in violation --

MS. ETLINGER: Right.

JUDGE RAGGI: -- of the regulation, in a letter that actually commended them for some of their practices.

MS. ETLINGER: Yes.

JUDGE RAGGI: But let me ask you, Social Service Law 385 specifies when the Commissioner can order that an agency not place out children anymore. And I don't see any of the reasons for which such an order can be entered to apply in this circumstance.

MS. ETLINGER: Yes.

JUDGE RAGGI: What is your authority to shut them down?

MS. ETLINGER: Well, 385 is a -- is specific authority under the title having to do with safety of children.

JUDGE RAGGI: Right. Which we would assume --

MS. ETLINGER: So --

JUDGE RAGGI: We would assume would be the primary concern of the [indiscernible].

MS. ETLINGER: That is a primary concern. But in addition to that authority, the State has authority under Social Services Law, Section 34, and Social Services Law, Section 371-10, where the agency commits itself to approval, inspection, and supervision. If there were not -- and 34 says that the agency has authority to make sure there's compliance with laws and regulations.

JUDGE RAGGI: Right. But why is it that if you find that they're not, why is it that you don't have to go to a court? Because presumably, what you're doing is invalidating their Certificate of Incorporation.

MS. ETLINGER: Well, we're not invalidating their Certificate of Incorporation which allowed them to do a number of different activities. We're saying that right now they're not in compliance with the legal --

JUDGE RAGGI: Why don't you have to go to court --

MS. ETLINGER: Because this is a --

JUDGE RAGGI: -- to alter a -- to basically narrow a Perpetual Certificate of Incorporation?

MS. ETLINGER: Well, I don't think the action affects their Certificate of Incorporation. It affects their ability to engage in adoption services in the way that they wish to. And this is an administrative

process. They would be subject to administrative process. If they didn't like the administrative process, they could go to court in a New York State Article 78 proceeding.

JUDGE RAGGI: Your letter -- your client's letter --

MS. ETLINGER: Yes.

JUDGE RAGGI: -- to them gave them two choices. Either, come -- become -- come in compliance with the regulation or start to close down.

MS. ETLINGER: Yes.

JUDGE RAGGI: And I am not sure I understand how you can tell an agency that it has to close down without a court order.

MS. ETLINGER: Well, and I would also point out that they're not raising that claim here, but I understand that Your Honor is interested in it.

JUDGE RAGGI: Well, it goes to the likelihood of success. I mean, all of this is -- it comes into whether or not you really are acting pursuant to appropriate authority.

MS. ETLINGER: Yes. But they're not claiming that we lacked authority to close them down. But the authority is that there's ongoing approval. There is necessarily ongoing approval under 371, Subdivision 10,

because there would be no other way we could tell whether they were in compliance with New York law. We have the right to inspect them on an ongoing basis and to supervise them.

JUDGE RAGGI: I must not be making myself clear.

Even assuming all of that, when you find them deficient in some way, I don't see where the law gives you the authority to order them to close down.

MS. ETLINGER: I think it's just general principles of New York State Administrative Law. When they're not in compliance with the law, we're withholding our approval, and they need the approval to operate.

JUDGE RAGGI: But they never need approval again, once they have perpetual authority. They -- you're right. You get to inspect; you get to do that. But they don't need you to sign off the way they needed you to sign off after their second year of incorporation.

MS. ETLINGER: Well, we -- OCFS disagrees. OCFS takes the position that they do need ongoing approval to conduct adoption services.

JUDGE RAGGI: Well, what the heck is the point of a perpetual authorization? This is my -- I'm perplexed by this particular --

MS. ETLINGER: It's just their corporate status, not their ability to engage in the conduct.

JUDGE RAGGI: It's their corporate status that is the legal authority for them to operate an adoption agency.

MS. ETLINGER: Well, they need both. They need both a corporate authority that gives them the authority to be an authorized agency, and they need OCFS approval, ongoing approval, to make sure that their program is being conducted pursuant to state law.

JUDGE RAGGI: Right. As I understand the last supervision report, there is no question that every adoption they have placed has been to parents who were qualified. Right?

MS. ETLINGER: Yes.

JUDGE RAGGI: Okay. So this isn't a case where they are just slipshod about their interviews or not really placing children in appropriate settings.

This is a case about whether the pool of applicants they're willing to consider for adoptive parents is what the State requires. And they're saying they can't consider some of those folks without violating their religion.

Now, I -- explain to us why we shouldn't view that as an infringement of their religious rights.

MS. ETLINGER: Their religious rights are not infringed because the Smith Test applies here. Contrary to their argument that there is a -- an exception to the Smith Test that's applicable here for state intrusion on internal church operations -- that's simply not what's going on here.

These are regulated adoption services. And as regulated adoption services, they're bringing together people outside their organization.

JUDGE RAGGI: Right. But they take no money. They don't have a contract with you. This isn't Fulton.

And so their argument is that basically you can't use your licensing authority, your authorization authority, to infringe their speech. And Smith does say when you infringe on religious exercise, and there's another right at stake, then you may have to satisfy strict scrutiny. But what --

MS. ETLINGER: With respect to --

JUDGE RAGGI: Why don't -- why shouldn't we will receptive to that?

MS. ETLINGER: Because on the free speech claim, the Supreme Court has long ruled that nondiscrimination rules regulate conduct, not speech. And their conduct is what is being enforced against here.

They must serve adoption applicants on a

nondiscriminatory basis. When they evaluate applicants, that activity must be done in a nondiscriminatory way.

JUDGE RAGGI: The ultimate thing that you're requiring them to do is be willing to say, after they've done all their evaluation, that a -- that an unmarried or a gay couple -- it would be in the best interests of a child to be placed with such a family. And they're saying they can never say that.

MS. ETLINGER: We're requiring them to make a determination that placement with a family -- that type of family may be in the child's best interest.

The much more difficult question -- and OCFS is very sensitive to this question -- is whether, if an agency was willing to conform its conduct to the regulation, if they were willing to bring in applicants of all different sexual orientations, if they were willing to do nondiscriminatory home studies to all of these applicants, if they were willing to place children with any of these applicants, could they still profess their belief with their speech? That's a very different question, and a much more sense -- a question that OCFS is very sensitive to, and it hasn't been presented with that question. New Hope has never --

JUDGE CABRANES: And what's the answer to that question?

MS. ETLINGER: Well, the -- truly the answer is OCFS has not developed a policy with respect to that, because it's never been faced with that situation.

But if you look at the regulation, the regulation regulates conduct. So it may well be that they could engage in speech of their choice -- this is what the District Court found -- as long as they're conduct conformed to the regulation.

JUDGE RAGGI: But it's hard for me to view this only as conduct when what they are ultimately required to do is make a recommendation.

MS. ETLINGER: Well --

JUDGE RAGGI: And recommendation seems to me to imply speech.

MS. ETLINGER: They're not making a recommendation. They're actually making a placement. So they're choosing the placement and placing the child with that family, which is an action. They're not making a recommendation to an outside agency that does the placement. Their ultimate -- the ultimate conduct that they were found to be in violation of is that they refuse --

JUDGE RAGGI: Don't they have to write a report that basically says it's in the best interests of the child to be placed with this couple?

MS. ETLINGER: No. They have to -- they have to conduct a home study, evaluating the family, make a placement. And then after they've made that placement, there are some submissions to the family court. But their -- but their -- their conduct --

JUDGE CABRANES: Sorry. It's then filed with the family court?

MS. ETLINGER: There is a report that they file with the family court.

But it's their -- it's their conduct that's being regulated here. They've never indicated that they would engage in the -- conform their conduct to the rule, but want to profess their belief in their counseling sessions. That's a much more difficult question and one that we don't have the actual answer to because OCFS has never been presented with that. But --

JUDGE CABRANES: Can I take you back to this perpetual existence --

MS. ETLINGER: Yes.

JUDGE CABRANES: -- business? What agency authorizes perpetual existence? Is that the OCFS?

MS. ETLINGER: It was a predecessor agency at the time. And these --

JUDGE CABRANES: But you said that it was -- that that was a reference to corporate existence.

MS. ETLINGER: Yes. It's filed with the Secretary of State.

JUDGE CABRANES: That's where I was heading.

MS. ETLINGER: That's exactly what it is.

JUDGE CABRANES: Yeah.

MS. ETLINGER: It's their corporate existence. So they're a corporation.

JUDGE CABRANES: So what does the OCFS have to do with the functions of the Department of State of New York, which is responsible for corporate existence?

MS. ETLINGER: When an agency wants to engage in adoption or foster care services, state law requires that the Certificate of Incorporation also be approved by OCFS.

JUDGE CABRANES: It's an additional requirement?

MS. ETLINGER: It's an additional requirement.

JUDGE CABRANES: Let me ask you about these regulations. Do they permit agencies to consider, when making placement decisions, an adoptive parents' age; is that right?

MS. ETLINGER: Yes. That's a valid -- I'm glad you brought that up, because that's a very interesting one, in particular to this case. Because OCFS places exclusively infants, newborns, and toddlers. And one -- and age, the statute says that age can be -- the age of

the child and the age of the prospective adoptive parents can be considered.

So one might think that in this situation, older parents would not very often or perhaps never at all, one might think, be appropriate placements in the best interests of a newborn. Because obviously, the State would like the parents to be around for at least 18 years or more.

But the consideration of age is not an exclusionary factor. There could, in fact, be instances where older parents are just the right placement for a newborn. If you had a newborn with special needs that needed a lot of special care, a retired couple might be exactly the right one.

So it doesn't -- none of the statutes and regulations that New Hope cites, that they claim permit discrimination, operate as an exclusionary rule.

JUDGE CABRANES: Well, what about race?

MS. ETLINGER: Race can be considered in a -- in a way that if the race of the child -- all of these other provisions want consideration --

JUDGE CABRANES: There's no question that they are permitted to consider race; right?

MS. ETLINGER: Well, it's -- the way it's actually worded is that the race or cultural identity of

the child, the parents' ability to consider the child's race and cultural identity is appropriate. It's not actually a matching of race.

And again, what you're starting with in those cases is the needs of the child. What does this child need for a placement?

JUDGE CABRANES: No. I -- no, we understand that. But you're permitted to consider also the religion of the parents; isn't that right?

MS. ETLINGER: Yes. And the religion means the label of the faith. OCFS does not --

MR. BROOKS: The label of the faith.

MS. ETLINGER: The label of the faith, not -- not the particular practices. So that if the --

And again, it's a best interest consideration. It's not a question of a Jewish family coming to the agency and being turned away because they're Jewish. That's never permitted. In fact, that's not permitted by the very same nondiscrimination regulation at issue here. So the consideration of religion in the best placement decision is not a discriminatory rule.

JUDGE CABRANES: But there's no question that you're preventing consideration of whether the adoptive parents are a same-sex couple as a result of the religious views of the agency?

MS. ETLINGER: Yes. Because the State has determined what factors are relevant to the best interest determination. And sexual orientation of the parents, the State has decided, is not a relevant factor to the well-being of the child.

JUDGE CABRANES: You don't think that there's a suggestion here that the regulation is targeting religious groups?

MS. ETLINGER: No. Because the --

And this Court has said in the St. Bartholomew's Church case that we cited in our brief, that the fact that there may be a disparate impact on religious organizations because of factual matters, they are the ones more likely to be affected is not evidence of discrimination.

JUDGE RAGGI: That was where the majority of people affected or the majority of entities affected were, in fact, not religious.

The plaintiffs submit that discovery would reveal that the vast majority, if not all, of the agencies that have had to go out of existence since this regulation was promulgated are religious organizations. Do you dispute that?

MS. ETLINGER: Well, in -- it's not in the record.

JUDGE CABRANES: [Indiscernible] you want discovery [indiscernible].

JUDGE RAGGI: Well, one can compare the web -- your web site's a matter of public record, and one can compare --

MS. ETLINGER: Well --

JUDGE RAGGI: -- what it -- how it existed at the start of 2018 and how it exists now.

MS. ETLINGER: Well, I can tell you that the -- those agencies that went out of existence did not do so because of the enforcement of this regulation. That's not in the record, but my client so advises me.

But to the extent there is an impact, because religious organizations are the ones that have a view about placement with same-sex couples does not mean that the agency was targeting those --

JUDGE RAGGI: Well, isn't that what discovery might reveal?

MS. ETLINGER: Discovery --

JUDGE RAGGI: Because I mean, the question here is whether there was any problem requiring this regulation with respect to any agencies other than those with religious views?

MS. ETLINGER: The law had developed to a place where same-sex couples were given equal rights to adopt.

And OCFS felt that to be consistent with that statute, it should revise its regulatory language because there had been regulations on the books that indicated that length of marriage and homosexuality were relevant to a best interest determination. So OCFS revised those regulations, and in doing so, also made it a rule that you can't discriminate on the basis of all of these characteristics: Race, religion, sex, sexual orientation, and marital status in the two adoption applicants.

JUDGE RAGGI: So with respect to religion, it -- you would have us conclude that it's just coincidental that Catholic Charities no longer does adoptions in Boston, Philadelphia, Chicago, Los Angeles, New Orleans, and most of New York?

MS. ETLINGER: No. It's because those are the organizations that have the belief that is inconsistent with the nondiscrimination rule.

JUDGE RAGGI: And the suggestion that I was making to you is that the plaintiff submits that in discovery, we would learn that the agencies that were operating in 2018 before the regulation and then after -- had to go out of business after the regulation are faith-based organizations.

MS. ETLINGER: But even if there's a disparate

impact on faith-based organizations, that doesn't mean that the agencies were targeted.

JUDGE RAGGI: I understand that.

But then we also get to the question of why your agency, confronted with a law that's permissive, decided to promulgate a regulation that was proscriptive -- who they were aiming it at. I mean, what problem there was that you felt needed to be addressed.

Now, it may be that discovery would reveal no -- no religious animus. But I thought in your briefs you conceded that the statements being made, at least that are in the record so far, are ambiguous.

MS. ETLINGER: Well, two things, discovery is not needed because the purpose of the regulation was made clear by the regulatory history. And we've cited all of this in our brief. There were --

JUDGE RAGGI: I thought you were acknowledging that it was ambiguous.

MS. ETLINGER: Well, to -- the -- I'm talking about separately, first, the history of the regulation. The history of the regulation shows that there were informational letters sent to the agencies explaining that we were bringing -- OCFS was bringing the function of the -- the regulations into compliance with changes in the law. And --

JUDGE RAGGI: And I mean, the problem is you went beyond the law.

MS. ETLINGER: And the statements --

JUDGE RAGGI: And so to the extent you write to the agencies, we're only bringing the regulation up-to-date with the applicable law, there's at least an argument for the plaintiffs to make that you went beyond that and that your purpose was -- it indicates some religious hostility.

MS. ETLINGER: These statements that they rely on -- two of the statements are somewhat similar to two of the statements in Masterpiece Cakeshop. This is what we explain in our brief. And those statements, the Court in Masterpiece Cakeshop found were ambiguous and could either be seen as simply a statement of nondiscrimination requirement or perhaps as dismissive of a religious confrontation. But the Masterpiece Cakeshop court was not concerned about those statements in the absence of the clearly hostile statements that followed.

JUDGE RAGGI: I understand that.

But you're not focusing on what I asked you about, which is that your regulation goes beyond the law in a way that raises concern, because the -- when the law was enacted, the governor said it wasn't going to

require anybody to change their policies. Everybody knew what he was talking about.

You went beyond and required them to change their policies. And they say they're entitled to discovery as to why you did that, and the reason they says there's a good faith basis to think it was discriminatory or your ambiguous statements and the ultimate consequences which is to effectively drive religious adoption agencies out of the New York market, they claim.

MS. ETLINGER: We think the history of the regulation, as set forth in our brief, including all of the informational letters that were issued one after the other in response to the changes in the law, explain where the agency was going and why it was going there. It felt that this was consistent -- even if it went beyond, that it was consistent with the law and with New York State law that prevents discrimination on the basis of sexual orientation, as a matter of civil rights under the Civil Rights Law, and in a -- in public accommodations under the Executive Law.

So they felt that this was entirely consistent with all of New York State law. The history of the regulation sets that forth, and we don't think discovery would produce anything beyond that. And the statements

speak for themselves. And the two statements that could be taken one way or the other were not found to be enough in Masterpiece Cakeshop. There are no other statements here. There are no statements that raise hostility toward religion.

JUDGE CABRANES: Let me ask you about that. Your client agency referred to New Hope's practices as, quote, archaic, unquote.

MS. ETLINGER: Well, the agency referred to the prior regulations, which permitted --

JUDGE CABRANES: Okay. I have a relatively simple question. Is it not correct that OCFS referred to New Hope's practice as archaic?

MS. ETLINGER: That is incorrect.

JUDGE CABRANES: That's incorrect. It never -- it never did that?

MS. ETLINGER: No. It referred to its prior regulations as archaic.

JUDGE CABRANES: I see. And did OCFS ask New Hope to, quote, compromise its beliefs?

MS. ETLINGER: No. OCFS pointed out that other agencies who had told the agency that they did have a problem with their beliefs and these placements had decided themselves to compromise.

JUDGE CABRANES: But you're -- yes, but that

means that were you not saying explicitly or implicitly that New Hope had to compromise its beliefs?

MS. ETLINGER: We -- I think what we were saying was they had the choice to do so if they chose.

JUDGE RAGGI: With the alternative being to shut down?

MS. ETLINGER: With the alternative to be shut down because --

JUDGE RAGGI: Right.

MS. ETLINGER: -- they were not in compliance with New York law.

JUDGE RAGGI: So [indiscernible] understand that on a Motion to Dismiss, we have [indiscernible] all of these pleadings in the light most favorable to the plaintiff. The -- in doing that, we would have to conclude that they were being told to either compromise or shut down.

MS. ETLINGER: But even the Supreme Court found that those statements were not enough to suggest hostility. It was only because the Commissioner went on to say that the plaintiffs' beliefs in Masterpiece Cakeshop were a despicable piece of rhetoric. That was the evidence that the Court was concerned about, not these somewhat ambiguous statements.

JUDGE RAGGI: I think they tried to draw an

analogy to that to the statement that there is no place in New York for any agency that -- I'm not -- I don't have the quote in front of me -- that basically does not view homosexual and unmarried couples as fit parents for adoption. And so they're suggesting that, less colorfully perhaps, you have expressed the same hostility.

In any event, at the dismissal stage, why isn't that enough?

MS. ETLINGER: Well, first of all, the statement was there's no place in New York for providers that choose not to follow the law. So it wasn't a specific statement about their belief.

JUDGE RAGGI: This regulation was what they were talking about.

MS. ETLINGER: Yes. This regulation.

JUDGE RAGGI: This regulation.

MS. ETLINGER: Because in -- because those statements are not enough to raise an inference about hostility. At most, they show there could be some ambiguity, but there is no evidence of hostility in those statements.

JUDGE RAGGI: Well, what's ambiguous is whether he had anything in mind other than faith-based agencies whose religious beliefs do not permit them to agree to

these two provisions.

MS. ETLINGER: The regulation prohibits discrimination on a wide variety of things.

JUDGE RAGGI: Right. But there was no reason to think that that was the concern he was addressing when he spoke; right? I mean, what was the context of the remark?

MS. ETLINGER: No. The context of the remark was agencies that refused to place with same-sex or unmarried couples.

JUDGE RAGGI: Right. So that -- that was what there was no place for.

MS. ETLINGER: Because the law didn't allow for it.

JUDGE RAGGI: Well, now the question is whether the law is -- violates the Constitution.

MS. ETLINGER: Right.

JUDGE RAGGI: But the question now is whether that reflects a hostility to a religious view, contrary to what was put into the regulation. Isn't that what -- where we are at?

MS. ETLINGER: Yes. And we don't believe that that expresses a hostile view, and we don't believe discovery will produce any evidence of anything else, because the history of the regulation is very clear that

it was enacted in response to the changes in the law.

JUDGE CABRANES: You think those comments can be construed as neutral?

MS. ETLINGER: Yes. Absolutely, because they are just saying that we feel strongly about this nondiscrimination rule, and the law has changed, and this is the rule that's consistent with the law now.

JUDGE CABRANES: Thank you, very much. Ms. Etlinger.

MS. ETLINGER: Thank you.

JUDGE CABRANES: I've given you as much time as your adversary, but he's reserved a couple of minutes.

MR. BROOKS: The Court has been generous, and I'll be short.

Counsel claims that the regulation regulates conduct, not speech. In their briefing, they're really focused on an incidental conduct argument citing Fair. And I would just really like to contrast what was going on in the Fair case.

In Fair, the conduct at issue was requiring the law school to hand a key to an empty classroom to a JAG recruiter. And the incidental speech at issue was requiring the law school to let the students know what classroom that was. And that's the conduct; that's the speech.

The situation here could not be more different. OCFS wants to force New Hope into the conference room with the birth mothers, with the adoptive parents, and control what it says.

It's much more analogous to if Donald Rumsfeld was trying to require the law school dean to stand up in front of the student body and advocate a JAG Corps career as a great choice for Yale graduates.

That would have been a different case. And I think, in fact, when you parse the Fair case, you don't have the parse it too closely. It says exactly that that would be prohibited and that it held the way it did in that case because it's fundamentally a fight about an empty conference room.

JUDGE RAGGI: What do you think are your legal obligations, though, given that you have an authorization pursuant to the laws of New York?

I mean, I don't understand you to be arguing that you're not obligated to follow every other rule and regulation that they've promulgated and that you, in fact, do. So I mean, obviously you think you're bound to comply with the rules and regulations of New York [indiscernible].

MR. BROOKS: Your Honor, I think that -- I think that when we have a lot of law that governs what happens

when free speech -- and I frankly think that's simpler in this case -- and free exercise run up against neutral regulation.

And that law, I think once you've determined, as we think we will determine that this law was not neutrally motivated and certainly not neutrally enforced, and we saw that before our very eyes in the attempt to shut down New Hope in the midst of the appeal -- if you get past that, well, then that clash is controlled by strict scrutiny. And we have precedent that guides us through that.

And may heartfelt religious beliefs sometimes have to give way to the State's necessity? Yes, according to -- applying the compelling state interest test of strict scrutiny. So it's hard -- there's no general answer. Strict scrutiny is a very case -- is a fact-specific inquiry. But how you resolve those issues, I think, is well established.

And Your Honors, I will stop. Thank you.

JUDGE CABRANES: Thank you, both of you, for excellent arguments. We're grateful to you both. Thank you.

We reserved decision. And we're adjourned.

(Conclusion of audio recording file labeled 2019.11.13 NHvP Oral Argument 19-1715 at 01:01:16.)

C E R T I F I C A T E

I, Katherine McNally, Certified Transcriptionist, do hereby certify that the foregoing pages 1 to 56 constitute a full, true, and accurate transcript, from electronic recording, of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

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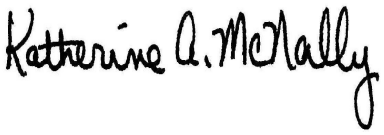

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